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BOOK REVIEWS

MYRES S. MCDOUGAL DISTINGUISHED LECTURE

Nuclear Weapons and the Law of Armed Conflict*

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It is a great honour for me to be asked to deliver this address which has been established in the name of Myres McDougal. Like every individual working in international law, I have had encounters with Mac. Let me give just one instance. In 1964, while I was Dean of Law at Singapore, we held a conference on the teaching of international law and Mac was among those present. I asked him if he would deliver a lecture to my class and he agreed. The first thirty minutes or so were taken up with Mac writing his peculiar vocabulary on the board followed by about forty minutes of lecture. This was followed by a heated debate between Mac and me. As we left the building, Mac asked another visiting professor, who, unlike me, was a former student of his, whether he thought that the lecture had made an impact. Our colleague replied that he wasn't sure that they understood what Mac was saying, but he was sure that these students would never forget that Mac had had the audacity to quarrel with their professor in public, something which is not normally done in the East.

Mac has written on many subjects and is, of course, an ardent believer in the rule of international law, and the contribution it can make to world order. He is also cognizant of the views of international decision makers. The cognizance of these views is essential in forecasting the acceptance and the possible legalizing of nuclear weapons and nuclear warfare. These views are becoming even more relevant since there is a growing awareness that fall-out and radiation are inherently dangerous to the environment and perhaps to the very existence of mankind. Mac recognizes this even though he has emphasised that nuclear weapons may be

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* Based on addresses to the Ottawa Conference on Nuclear Weapons and The Law, 1987, and the McDougal lecture at the University of Denver College of Law, 1988.

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essential for the defence of the free world[1]. As he has pointed out:

> From the perspective of realistic description, . . . international law . . . is not a mere static body of rules but is rather a whole decision-making process, a public order which includes structure of authorized decision-makers as well as a whole international body of highly flexible, inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of a particular nation-state unilaterally put forward claims of the most diverse and conflicting character . . . , and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in the terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is a living, growing law, grounded in the practices and sanctioning expectations of nation-state officials, and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena.[2]

Insofar as the 'Legal Bases for Securing the Integrity of the Earth-Space Environment' are concerned, Mac has reminded us that:

> . . .law is not some frozen set of pre-existing rules or arrangements that inhibits constructive action about environmental and other problems, but rather a dynamic and continuous process of authoritative decision through which the members of a community clarify and implement their common interests. . . . In recent decades, participation in world constitutive process, as in the embracing process of effective power, has been tremendously democratized—with not merely nation-states but also international governmental organizations, political parties, pressure groups, private associations, and individual human beings playing important roles. . . . Similarly, a multiplying host of private associations, operating within the larger constitutive process, and increasingly international in membership, has similar goals and areas of activity.[3] Groups and individuals especially concerned with environmental problems have abundant opportunity to participate in all aspects of making and applying law. . . . [But if] comprehensive planning, development, and controls are to be achieved and made to secure the overriding goals of both maintaining a secure environmental base and promoting and augmenting human dignity values, many delicate and continuing adjustments will be required in the management of processes of authority and effective power at all levels of government, from local through national and regional to global. . . . The task of highest priority for all genuinely committed to the goal values of human dignity is, of course, that of creating in the peoples of the world the perspective necessary both to

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1. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 356-357 (1955).

2. *Id.* at 356-357.

3. *E.g.*, Greenpeace, Men of the Trees, Sierra Club; *see* Sierra Club v. Coleman, 421 F. Supp. 63 (1976).

> their more realistic understanding of their common interests in relation to the environment and to their invention, acceptance, and initiation of some of the many equivalent measures in constitutive processes that might better secure such common interests.[4]

In addition to his concern for preserving the environment, Myres McDougal is equally concerned for human rights. He maintains that the respect for these rights constitutes *jus cogens*.[5] It cannot be denied that nuclear warfare would amount to the greatest threat to the fundamental human right to life and yet, Mac recognizes the legality of such weapons in self-defence. Moreover, while he points out that

> [t]he destructive power of forces unleashed by the fission or fusion of atomic nuclei. . . makes it difficult to characterize nuclear and thermonuclear bombs as 'just another weapon', [n]onetheless, the basic policy issues involved in the use of those weapons in war are fundamentally the same issues raised by the other weapons or methods of mass destruction, including, in particular, strategic target area bombing. In respect of the one as in respect of the other, it is difficult to accept with much confidence absolute affirmation or blanket denials of legitimacy, however creditable the motivations of the persons affirming or denying. No clear and unmistakable consensus is observable among commentators or governments on questions of lawfulness. The continuing attempts, however, by various governments and groups to 'outlaw' nuclear weapons tend to sustain the impression that such weapons are regarded as permissible pending the achievement of agreement to the contrary. . . . [H]owever distressing it may be,. . . processes of derivation and 'analogy' from conventional rules and from inherited principles are hopelessly inadequate to sustain assertions, in realistic expectation of probable future decision, of a comprehensive prohibition in international law of the use of nuclear weapons. Such a prohibition so devoutly to be wished for by all who cherish the values of human dignity, or perhaps even survival, must require more effective implementation. Perhaps the only limitation that can at present be projected with any plausibility is the ultimate one, that is, the prohibitions of uses of these weapons for purposes of terrorization, in effect the annihilation, of the general enemy population. . . . [E]ffective control of and protection from nuclear weapons can be hopefully sought . . . no[t] even in a new and unequivocal agreement outlawing these weapons, but rather in the achievement of a consensus . . . in the context of a comprehensive and continuing sanctioning process, that sustains the principle of minimum order itself as well as a prohibition of nuclear weapons.[6]

This latter comment should caution us in our enthusiasm for agree-

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4. *Festschrift für Wilhelm Wengler*, 1 MULTITUDO LEGUM IUS UNUM, 261, 263-65, 270-71, 288 (1973).

5. Address on Human Rights and World Public Order, INT'L L. A. CONF., Brussels (1973).

6. M. MCDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER, 659, 667-68 (1961).

ments on the limitation of specific types of nuclear weapons among the various nuclear weapons. There is a tendency to acclaim any such agreement as the great breakthrough and guarantee of future safety, overlooking the fact that, despite the destruction of such weapons envisaged by the particular agreement, the remaining stockpile is still sufficient to destroy the world many times over. Given this fact and the realisation that no country is prepared to see its own or the world's destruction, it is time we turned our attention to the issue of nuclear weapons and the law of armed conflict.

Any such analysis must begin with the 'Martens Clause' part of the Preamble of the IVth Hague Convention of 1907.

> Until a more complete code of the laws of war has been issued [—and this has not yet occurred—], the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them [—and annexed to the Convention—], the inhabitants and belligerents *remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.*[7]

Article 22 of the Regulations expressly provided that "the right of belligerents to adopt means of injuring the enemy is not unlimited." That these humanitarian principles are still applicable is clear from what may be regarded as the nearest we have to a supplementary code additional to that of The Hague. In the Protocol I Addition to the Geneva Conventions of 12 August, 1949, relating to the Protection of Victims in International Armed Conflicts, adopted in 1977, this preambular reference has been elevated to the main body of the Protocol.[8] It is reproduced with merely a slight verbal change, "as they result from the usages established among civilized peoples" having become "derived from established custom." This acknowledges development during the seventy years since The Hague. It is now accepted that all independent nations are in fact 'civilized',[9] and that the distinction between civilized and other peoples belongs to an outdated colonial era. Article 35 of the Protocol is more restrictive in its control of methods and means of warfare, providing as 'basic rules' that:

> 1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited. 2. It is prohibited to employ weapons, projectiles and material methods of warfare of a nature to cause superfluous injury or unnecessary suffering, and Article 35 introduces a new concept which reflects the United Nations Convention on the Prohibition of Military and Other Hostile Use of Environmental Modification Techniques.[10] The Article states that:

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7. D. SCHINDLER & J. TOMAN, THE LAWS OF ARMED CONFLICTS 63-64 (1981).

8. *Id.* at 558, art. 1(2).

9. *See, e.g.*, Walton v. Arab American Oil Co., 233 F.2d 541, 545 (2d. Cir. 1956), in which the 2d Circuit Court refused to consider Saudi Arabia as 'uncivilized'.

10. D. SHINDLER & J. TOMAN, *supra* note 7, at 131.

> 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

The importance of the references to the Protocol, even though it has not yet been ratified by any major military power, lies in the fact that, unlike Hague Convention IV, it is not restricted to land warfare. It should be noted, however, that the Nuremberg Tribunal expressly stated[11] that "by 1939 [the] rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war." It is arguable that the general principles embodied in the Hague Regulations, especially those relating to the treatment of non-combatants, armistice and peace, based as they are on humanitarian principles, are of general application regardless of the theatre of war. This view is supported in the 1949 Geneva Conventions and Protocol I of 1977.

It should be noted that a finding of "superfluous injury or unnecessary suffering," which was forbidden in Hague Regulations 23,[12] is not based on the subjective reaction of the person injured. It is foreseeable that a victim would consider any injury suffered in conflict, by whatever means, to be 'unnecessary or superfluous'. Support for this interpretation may be seen in a 1962 publication of the United States Department of the Army[13] in its comment upon the ban on the use of poison in the Hague Regulations.[14]

> It is in the area of poisonous rather that poisoned weapons that the chief difficulty in applying the prohibition against poison is encountered. (a) The *poisoned* spear, arrow or bullet would be prohibited because the spear, arrow, and bullet are or have been legitimate weapons in their own right. The poison adds little to their effectiveness. The suffering produced by the poison is unnecessary, the weapon itself having already placed the victim *hors de combat*. Also, the application of poison to them converts them into a mere conveyance of the poisoned substance. It is the poison and the unnecessary suffering, not the bullet, which is condemned. (b) Such is not the case with such modern weapons as toxic chemical agents and nuclear explosives. Here the poison, if it can be called that, is either an after effect of the use of the weapon or an essential part of the weapon itself. Prior to the perfection of modern weapons the use of poison had been condemned because its use was both unnecessary and unsoldierly, it being administered almost always in a covert fashion. It was a maxim of the Roman Senate that 'war was to be carried on with arms not with poison'. Tiberius, in rejecting the use of poison states, '[i]t was the practice of the Romans to take vengeance on their enemies by open

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11. *Judicial Decisions Int'l Military Tribunal (Nuremburg), Judgement and Sentences*, 41 AM. J. INT'L L. 172, 248-49 (1947).

12. ". . . it is especially forbidden. . . (e) To employ, arms, projectiles, or material calculated to cause unnecessary suffering."

13. *U.S. Dept. of the Army Pamphlet 27-161-2*, 2 INT'L L. 40, 40-41 (1962).

14. REG. 23: ". . . it is especially prohibited (a) To employ poison or poisoned arms."

> force and not by treachery and secret machinations.[15] These reasons are not applicable to modern weapons. The 'poison' may be an arm and it may be administered by open force. If so, then other considerations may be more applicable in determining its legality or illegality.

Such other considerations bring into play the concept of proportionality. A recent commentary on Protocol I explains that:

> The prohibition concerning the infliction of superfluous injury or unnecessary suffering is merely an implementing rule derived from the basic principles . . . prohibiting those measures of military violence, not otherwise prohibited by international law, which are not necessary (relevant and proportionate) to the achievement of a definite military advantage. The rule is therefore another way of stating the rule of proportionality . . . . In this context the language . . . is more a reaffirmation than a development.[16]

This implies that since the purpose of war is to defeat the enemy and to impose one's own will upon him, it is sufficient to disable his fighting forces, without the concomitant of complete destruction of those forces. Clausewitz recognized this to be so, even though he stated that since "war is an act of force, there is no logical limit to the application of force."[17] This seems to be in line with his assertions that "[the] impos[ition of] our will on the enemy is [the] object[ive of our using force]. To secure [this] object[ive] we must render the enemy powerless . . . . The fighting forces must be *destroyed*: that is they must be *put in such condition that they can no longer carry on the fight.*"[18] However,

> attached to force are certain self-imposed perceptible limitations . . . known as international law and custom . . . if civilized nations do not put their prisoners to death or devastate cities or countries, it is because intelligence plays a larger part in their methods of warfare and has taught them more effective ways of using force than the crude expression of instinct.[19]

In fact, we may define the principle of proportionality as establishing:

> a link between the concepts of military necessity and humanity. This means that the commander is not allowed to cause damage . . . which is disproportionate to military need [—nor is he permitted to allow those under his command to cause such damage]. It involves weighing the interests arising from the success of the operation on the one hand, against the possible harmful effects upon protected persons and objects on the other [—thus it is enough to render combatants *hors de*

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15. VATTEL, LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE, ch. VII at 155 (1758) [Carnegie tr. at 288 (gives the Tiberius reference as "that the Romans revenged themselves upon their enemies by open force, and not by dishonorable methods and secret plots,") (1916)].

16. BOTHE, PARTSCH & SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 195 (1982).

17. C. CLAUSEWITZ, ON WAR 27 (Howard-Paret ed. 1984).

18. *Id.* at 90.

19. *Id.* at 76.

> *combat* without inflicting excessive injury or inevitable death]. That is, there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects . . . . It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances, largely because the comparison is often between unlike quantities and values. [20]

In so far as specific weapons may have been banned the issue of proportionality is irrelevant, for any use of such weapons would constitute a breach of the law.[21] If weapons, for example, booby traps,[22] incendiaries,[23] or gas,[24] have been proscribed by treaty there is no problem. This is true although a power which has neither ratified nor acceded to such a treaty may well argue that it is not bound thereby, regardless of the number of parties or the extent to which *opino juris* maintains that the proscription amounts to customary law. This was the position with regard to the 1925 Geneva Gas Protocol which affirmed that "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices has been justly condemned by the general opinion of the civilized world . . . [and its] prohibition shall be universally accepted as part of International Law, binding alike the conscience and practice of nations . . ." In 1935 the United States Naval War College concluded that "the use of poisonous gases and those that cause unnecessary suffering is in general prohibited".[25] However, as Charles Cheney Hyde has pointed out:

> It is to be expected that a belligerent power will endeavor to make the best possible use of a relative military advantage and to be contemptuous of the dictates of humanity when they appear to frustrate a means of attaining an early and decisive victory. It may be greatly doubted, therefore, whether conventions purporting to restrict or regulate or prohibit recourse to particular forms of chemical warfare are to be relied upon to prevent a belligerent from employing them against the enemy when a relative advantage from so doing is sufficiently clear.[26]

This statement concerns what course of action is likely if a belligerent considers a treaty's restraint to be against its interests. The 1956 edition of the United States Field Manual on the Law of Land Warfare was less definitive:

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20. Lt. Col. W. Fenreck, Paper given to officers attending Basic Law of Armed Conflict course 8701 (Dept. of the Judge Advocate General, National Defence Headquarters, Ottawa, Apr. 1987).

21. *See generally* L.C. GREEN, *Lawful and Unlawful Weapons and Activities*, in ESSAYS ON THE MODERN LAW OF WAR (1984).

22. *Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, Protocal II*, 19 I.L.M. 1523, 1529 (1981).

23. *Id.* at 1529.

24. D. SCHINDLER & J. TOMAN, *supra* note 7, at 109.

25. C. HYDE, INTERNATIONAL LAW SITUATIONS 106 (1935).

26. 3 INT'L L. CHIEFLY AS INTERPRETED AND APPLIED BY THE U.S. 1823 (1947).

> The United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or non-toxic gases, . . . or of bacteriological warfare . . . . The Geneva Protocol . . . signed . . . on behalf of the United States and many other powers has been ratified or adhered to by and is now effective between a considerable number of States. However, the United States Senate has refrained from giving its advice and consent to the ratification of the Protocol by the United States, and it is accordingly not binding on this country.[27]

This situation was changed with the formal adherence by the United States to the Protocol in 1975.[28]

The attitude of the United States prior to its adherence to the Protocol was in accordance with the accepted position in the international law of treaties.[29] This principle is seen in the decision of the World Court in the *S.S. Lotus* case.

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[30]

The general effect of the judgment is that states are free to do whatever international law does not forbid them from doing. In the light of this approach to the nature of international law and the discretion possessed by states there evolved the doctrine *pacta tertiis nec nocent nec prosunt* which was applied in the *Free Zones*[31] case. The doctrine was restated bluntly by Judge Read in his Separate Opinion on the *International Status of South-West Africa*. "It is a principle of international law that the parties to a multilateral treaty, regardless of their number or importance, cannot prejudice the legal rights of other States."[32] This principle is stated *simpliciter* in the Vienna Convention on the Law of Treaties:

> Article 34. *General rule regarding third States*
>
> A treaty does not create either obligations or rights for a third state without its consent.[33]

In addition to weapons which are expressly banned by treaty, some

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27. U.S. Dept of the Army, FM27-10, ¶ 38.

28. *See Presidential Statement of Jan. 22, 1975*, 14 I.L.M. 299 (1975); *Executive Order 11850*, 14 I.L.M. 794 (1975).

29. *But see*, Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1 (1985).

30. S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 20, 35.

31. Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 2 HUDSON WORLD COURT REPORTS 448 (P.C.I.J. 1932).

32. 1950 I.C.J. 128, 165.

33. Vienna Convention on the Law of Treaties, 8 I.L.M. 679, 693 (1969).

means and methods of warfare are forbidden in accordance with customary law, although it must be recognized that such weapons have, for the main part, fallen into desuetude and lost their usefulness in modern combat. Thus, both the British and American Manuals of Military Law[34] forbid lances with barbed heads which would have been of value in hand-to-hand combat by mounted knights in armour. The German War Book of 1902, however, is more explicit. "The progress of modern invention has made superfluous the express prohibition of certain old-fashioned but formerly legitimate instruments of war (chain shot, red-hot shot, pitch balls, etc.), since other, more effective, have been substituted for these."[35]

Prima facie, knowing what we now do of the effects of atomic or nuclear weapons, it would appear that these weapons fall within the prohibitions concerning unnecessary suffering and proportionality. However, it may be questioned whether the effects, especially long-term, of the atomic bombs used against Hiroshima and Nagasaki in 1945, were sufficiently known to bring them within the prohibition. From the point of view of the casualties, both personal and material, immediately affected, there seems little ground for contending that such aerial attack was any more illegal than the attacks against Rotterdam, Coventry, Dresden, Bremen, Hamburg, Berlin or the 'fire-bomb' attacks against Tokyo.[36] As to the long-term effects, many of which might not have been foreseeable at the time, it is perhaps useful to refer to *Administrative Decision No. 11*,[37] rendered by the United States-German Mixed Claims Commission.

> The proximate *cause* of the loss must have been in legal contemplation the act of Germany. The proximate *result* or *consequence of that act* must have been the loss, damage or injury suffered . . . . Whether the subjective nature of the loss was direct or indirect—is immaterial, but the *cause* of [the injured party's] . . . suffering must have been the act of Germany or its agents. This is but an application of the familiar rule of proximate cause—a rule of general application both in private and public law—. . . . It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely traced, link by link, to Germany's act. But the law can not consider . . . the 'causes of causes and their impulsion on one another'. Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in or-

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34. H.M.S.O., MANUAL OF MILITARY LAW, Part III, The Law of Land Warfare, ¶ 110 (1958); U.S. FM , *supra* note 27, at ¶ 34.

35. Morgan trans. 66, (1915).

36. *See, e.g.*, J. SPAIGHT, AIR POWER AND WAR RIGHTS 273-75 (1947).

37. 7 U.N.R. INT'L ARB. AWARDS 23, 29-30 (1923) (italics in original).

> der to link Germany with a particular loss. All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause from which they flowed.

In the *War Risk Insurance Premium Claims*[38] case the same Commission stated:

> The use of the term [indirect damages] to describe a particular class of claims is inapt, inaccurate and ambiguous. The distinction sought to be made between *damages* which are direct and those which are indirect is frequently illusory and fanciful and should have no place in international law. The legal concept of the term 'indirect' when applied to an act proximately causing a loss is quite distinct from that of the term 'remote'. The distinction is important.

Some of this 'importance' may be seen if we refer to the claim made in the *Trail Smelter*[39] arbitration for damages in respect to the non-production of timber allegedly resulting from the original tort.

> With respect to damage due to the alleged lack of reproduction . . . the Tribunal is of the opinion that it is not proved that fumigations prevent trees from producing sufficient seeds, except in so far as the parent-trees may be destroyed or deteriorated themselves . . . . [T]he loss of possible reproduction from seeds which might have been produced by trees destroyed by fumigation . . . is too speculative a matter to justify any award of indemnity . . . . [Evidence shows] there is a general lack of reproduction of both yellow pine and Douglas fir over a fairly large area, and this is certainly due to some extent to fumigations. But . . . it is impossible to ascertain to what extent this lack of reproduction is due to fumigations or to other causes such as fires occurring repeatedly in the same areas or destruction by logging of the cone-bearing trees . . . . It is further to be noted that the amount of rainfall is [also] an important factor in the reproduction [of the trees in question].

It is asserted that the atomic bombs contributed to the sterility of some of their victims. Other factors, however, such as the inability of particular victims to find mates, as well as natural sterility, may have been deciding factors. The size of a damages award depends upon the illegality of the original act from which the damage is alleged to have followed. Since there was in 1945 no clear rule of customary law or treaty forbidding resort to atomic weapons, the decision as to their legality depends upon the basic rules regarding unnecessary suffering and proportionality. Since the use of these two bombs was intended to bring the war in the Far East to an earlier termination than might otherwise have been possible, and since it was feared that the resistance by the Japanese forces would be sustained and determined, resulting in exceedingly heavy allied casualties, it is arguable that the rule of proportionality was not infringed.

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38. *Id.* at 44, 62-63.
39. 3 U.N.R. INT'L ARB. AWARDS 1905, 1929-30.

It is also arguable that, even assuming the weapon is *prima facie* illegal, recourse to it might be justified on the ground of reprisal. One must recall the behavior of the Japanese in the invasion of China, specifically what happened in Shanghai and Nanking, which was followed by the atrocities in Hong Kong and Singapore. Then, when one considers the ill-treatment of prisoners, under Japanese control, on the Siam-Burma railway and the frightfulness of what happened in Manila, and the threat that this might occur prior to every retreat by the Japanese, it becomes difficult to contend that the effects of the atomic bombs were in any way disproportionate, particularly since Japan's surrender followed so closely upon their use. In this connection the comment by Lauterpacht is notable:

> . . . it is difficult to express a clear view as to whether an explicit prohibition of the use of atomic weapon in warfare would be merely declaratory of existing principles of International Law. In any case, so long as the production of the atomic bomb has not been prevented in practice by international agreement and supervision, there must be envisaged the possibility of its being resorted to in contingencies not amounting to a breach of International Law. In the first instance, its use must be regarded as permissible as a reprisal for its actual prior use by the enemy or his allies. Secondly, recourse to the atomic weapon may be justified against an enemy who violates rules of the law of war on a scale so vast as to put himself altogether outside the orbit of considerations of humanity and compassion. Thus if during the Second World War it had become established beyond all reasonable doubt that Germany was engaged in a systematic plan of putting to death millions of civilians in occupied territory, the use of the atomic bomb might have been justifiable as a deterrent instrument of punishment . . . . Moreover, as laws are made not only for the protection of human life, but also for the preservation of ultimate values of society, it is possible that should those values be imperilled by an aggressor intent upon dominating the world the nations thus threatened might consider themselves bound to assume the responsibility of exercising the supreme right of self-preservation in a manner which, while contrary to a specific prohibition of International Law, they alone deem to be decisive for the ultimate vindication of the law of nations.[40]

Since international law reflects the views of what states regard as legally binding upon them, it is essential that the laws of armed conflict reflect military realities, and this of course in endemic in the concept of proportionality. If the laws of war are too far from what military necessities demand, those rules will not be observed. In fact, as was clear from the Geneva Conference on Humanitarian Law, 1974-77, most delegations include military personnel to ensure that idealism does not run wild and replace reality. The importance of paying attention to military requirements may be seen from the criticism levelled against Lieber's Code[41] by

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40. 2 L. OPPENHEIM, INTERNATIONAL LAW 351 n.2 (7th Ed. 1952).
41. Instructions for the Govt. of Armies of the U.S. in the Field, Gen. Orders No. 100,

Bordwell.[42] Bordwell states that because the Code was "written by a non-military man, it lacked the clearness which actual experience would have afforded, and omitted much that might have occurred to one who had seen responsible service in the field." The importance of military experience is clearly indicated in the Preface to the *Oxford Manual* published by the institute of International Law in 1880. "The Institute . . . believes it is fulfilling a duty in offering to the governments a *Manual* suitable as the basis for national legislation in each State, and in accord with both the progress of juridical science and *the needs of civilized armies.*"[43] In light of this we should also look to the views of some of the leading nuclear powers to ascertain their appreciation of the law concerning atomic or nuclear warfare. Since China and France, both nuclear powers, have refused to become parties to the Nuclear Test Ban Treaty of 1963[44] it may be presumed that they are unwilling to concede that nuclear weapons are illegal. The Soviet Union has expressed its opposition to such weapons in ideological terms. The Soviet Union is:

> guided by the principles of socialist humanism [and] continues to work for the international prohibition of barbarous means of waging war. It is necessary especially to emphasise the outstanding part played by the U.S.S.R. in the campaign for the prohibition of atomic and thermonuclear weapons, which are weapons for the mass annihilation of civilian populations. The impermissibility of the use of weapons of mass destruction arises from a generally recognised principle of International Law and *expresses the legal awareness of all progressive* mankind . . . . The use of such weapons is also condemned by some *bourgeois* writers, e.g., P. Guggenheim . . . .[45]

Since Soviet endeavours to this end have been 'sabotaged' by the 'obstructionist tactics' of the United States and the United Kingdom, the Soviet emphasis has reverted to what it was in the days of the League of Nations, advocacy of complete disarmament. This includes:

> the abolition of armed forces and armaments of all States, to end arms production, abolish ministries of war, general staffs, and all kinds of military and para-military establishments and organizations and also stop the allocation of money for military purposes . . . . The Soviet Government continues to strive for agreement on the cessation of tests and the prohibition of atomic weapons, and on *disarmament as a whole, in which all the peoples of the world are interested.*[46]

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24 Apr. 1863, D. SCHINDLER & J. TOMAN, *supra* note 7, at 3.

42. BORDWELL, THE LAW OF WAR BETWEEN BELLIGERENTS 74 (1908).

43. D. SCHINDLER & J. TOMAN, *supra* note 7, at 35-36 (italics added).

44. 480 U.N.T.S. 43, *See, e.g.* ROSSEAU, LE DROIT DES CONFLICTS ARMÉS 127 (1983): "il n'existe aucune disposition juridique qui interdise d'une manière générale la production, la possession et l'emploi des armes nucléaires, en dehors de l'interdiction des essais nucléaires à des fins militaires résultant du traité de Moscou du 1963, auquel sont parties 105 Etats, à l'exception de la France et de la Chine."

45. ACADEMY OF SCIENCES OF THE U.S.S.R., INSTITUTE OF STATE LAW, INTERNATIONAL LAW 411-12 (1963) (italics added).

46. *Id.* at 414-15 (italics added).

The United States *Manual* on the Law of Law Warfare states "[t]he use of explosive 'atomic weapons', whether by air, sea, or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment."[47] The British *Manual* is somewhat shorter, and states:

> There is no rule of international law dealing specifically with the law of nuclear weapons. Their use, therefore, is governed by the general principles laid down in . . . paragraph 107, note 1. (In the absence of any rule of international law dealing expressly with it, the use which may be made of a particular weapon will be governed by the ordinary rules and the question of the legality of its use in any individual case will, therefore, involve merely the application of the recognized principles of international law, as to which see Oppenheim, vol. II, pp. 346-52).[48]

The most complete military statement on the issue of nuclear weapons is to be found in a 1962 publication of the United States Department of the Army:

> The provisions of international conventional and customary law that may control the use of nuclear weapons are (1) Article 23(a) of the Hague Regulations prohibiting poisons and poisoned weapons, (2) the Geneva Protocol of 1925 which prohibits the use not only of poisonous and other gases but also of 'analogous liquids, materials or devices',[49] (3) Articles 23(e) of the Hague Regulations which prohibits weapons calculated to cause unnecessary suffering, and (4) the 1868 Declaration of St. Petersburg which lists as contrary to humanity those weapons which 'needlessly aggravate the sufferings of disabled men or render their death inevitable'.[50]
>
> It has been asserted that even if these four provisions are applicable to nuclear weapons they are inadequate to control them, without a new specific prohibition.[51] Article 35, FM27-10 [the Field Manual] adopts the positon that 'explosive atomic weapons' are not violative of international law in the absence of a rule restricting their employment.
>
> The unpublished annotation to paragraph 35 explains the reason for the conclusion that such weapons are now (1956) lawful:
> The weapon has already been used, it is still with us, and the major powers are virtually committed in an operational sense to its use in a future war . . . . The weapon has gained such acceptance that it is spoken of in the context of disarmament rather than of illegality.

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47. U.S. FM, *supra* note 27, at n.22, ¶35.

48. H.M.S.O., *supra* note 34, at n.29 ¶111.

49. G. SCHWARZENBERGER, LEGALITY OF NUCLEAR WEAPONS 37-38 (1958) (author bases the illegality of such weapons on that of gas, considering both a form of 'poison').

50. D. SCHINDLER & J. TOMAN, *supra* note 7, at 95.

51. *See, e.g.*, STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICTS 344 (1954); Kunz, *The Chaotic State of the Laws of War*, 45 AM. J. INT'L. L. 37 (1951).

> The qualifying word "explosive" is inserted to save taking a position on the use of an atomic weapon, the effect of which was confined to radiation [—such as the neutron bomb]. Such an arm might conceivably run afoul of the prohibition of paragraph (a), Article 23, HR, prohibiting the use of poison or poisoned weapons. This last paragraph of the annotation is important because it underlines the fact that the atom bomb has not one effect, but three effects. They are fire, blast, and radiation. The weapon was used in World War II for its blast effect, a use similar to all high explosives. However, it can conceivably be used in a situation where only one of the three effects will result, that of radiation. This could occur if the bomb were detonated under water in a harbor. The port city would then be drenched with radioactive water. Similarly a high altitude explosion would create only a radiation hazard. It is this singular effect which the annotation warns may run afoul of Article 23(a) HR on the use of poison. Because the blast effect is similar to normal bombings, FM27-10 offers some guidance in its adoption of the rule of proportionality in bombardments: ". . . loss of life and damage to property must not be out of proportion to the military advantage to be gained."
>
> The norm of proportionality would apply equally well to the radiation side effects of the blast. If the radiation is cumulative, then the continued use of nuclear weapons might tend to make such use disproportionate despite the fact that the blast effects are confined to important military objectives.[52]

If, however, nuclear weapons of a type that may be used solely for tactical purposes in the field are involved, some of the objections based upon the indiscriminate character of the fall-out become irrelevant.

Since the military manuals of the kind discussed here are not legislative measures, they possess no greater binding authority than any other commentary or legal textbook. This point is clearly made in the opening paragraph of the United States Manual.

> The purpose of this Manual is to provide authoritative guidance to military personnel of the customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral States . . . . This Manual is an official publication of the United States Army. However, those provisions of the Manual which are neither statutes nor the text of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war. However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice . . . .

A similar exposition of the role of the British Manual is to be found in Part I of that Manual, published in 1956. The true significance of such Manuals may be seen in the comments of the United States military tribunal in *Re List (The Hostages Trial)*:[53]

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52. U.S. FM, *supra* note 27, at n.8, 42-44.
53. 8 U.N.W.C.C., *Law Reports of Trials of War Criminals* 34 (1948).

> The fact that the British and American armies may have adopted [Oppenheim's views on the validity of superior orders as a defence to a war crimes charge] for the regulation of their own armies as a matter of policy does not have the effect of enthroning it as a rule of International Law . . . . Army regulations are not a competent source of International Law. They are neither legislative nor judicial pronouncements. They are not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilized nations generally. It is possible, however, that such regulations, as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions have been put into general practice . . . . Determination, whether a custom or practice exist, is a question of fact. Whether a fundamental principle of justice has been accepted is a question of judicial or legislative declaration. In determining the former, military regulations may play an important rule but, in the latter, they do not constitute an authoritative precedent.[54]

Since judicial decisions are not obliged to follow military manuals, it is necessary to examine what judicial statements, concerning the legality of atomic or nuclear weapons, have been made. Neither of the International Military Tribunals, Nuremberg nor Tokyo, established at the end of World War II, dealt with the legality of aerial bombardment, nor with the use of the atomic bomb. However, Judge Pal of India, who dissented on all counts from the majority verdict at Tokyo, delivered a most scathing condemnation of the use of this weapon which he compared with the most 'atrocious' orders or policies of Wilhelm II during World War I.

> In the Pacific war under our consideration, if there was anything approaching [the ruthlessness of the Kaiser], it is the decision coming from the allied powers to use the ATOM BOMB. Future generations will judge this dire decision. History will say whether any outburst of popular sentiment against usage of such a new weapon is irrational and only sentimental and whether it has become legitimate by such indiscriminate slaughter to win the victory by breaking the will of the whole nation to continue the fight. We need not stop here to consider whether or not 'the atom bomb comes to force a more fundamental searching of the legitimate means for the pursuit of military objectives'. It would be sufficient for my present purpose to say that if any indiscriminate destruction of civilian life and property is still illegitimate in warfare, then, in the Pacific war, this decision to use the atom bomb is the only near approach to the directives of the German Emperor during the first world war and of the Nazi leaders during the second world war. Nothing like this could be traced to the credit of the present accused.[55]

More significant is the decision of the Tokyo District Court in

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54. *Id.* at 51.

55. Pal, INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST—DISSENTING JUDGMENT, 620-21 (1953).

Shimoda v. Japan[56] that the atomic bombing of both Hiroshima and Nagasaki was 'an illegal act'. The Court recognized, however, that the bomb was a new weapon and that there was no prohibition directly on point.

> Of course, it is right that the use of a new weapon is legal, as long as international law does not prohibit it. However, the prohibition in this case is understood to include not only the case where there is an express provision of direct prohibition but also the case where it is necessarily regarded that the use of a new weapon is prohibited, from the interpretation and analogical application of existing international laws and regulations (international customary laws and treaties). Further, we must understand that the prohibition includes also the case where, in the light of principles of international law which are the basis of the above-mentioned positive international laws and regulations, the use of a new weapon is admitted to be contrary to the principles. For there is no reason why the interpretation of international law must be limited to grammatical interpretation, any more than in the interpretation of national law.
>
> There is also an argument that a new weapon is not an object of regulation of international law at all, but such argument has not a sufficient ground as mentioned above. It is right and proper that any weapon contrary to the custom of civilized countries and to the principles of international law, should be prohibited even if there is no express provision in the laws and regulations. Only where there is no provision in the statutory (international) law, and as long as a new weapon is not contrary to the principles of international law, can the new weapon be used as a legal means of hostility . . . .
>
> In the past, although objections were made by various interests against the appearance of a new weapon because international law was not yet developed, . . . new weapons nevertheless came to be regarded as legal with the later advancement of civilization and the development of scientific techniques. This, however, is not always true . . . . Therefore, we cannot regard a weapon as legal only because it is a new weapon, and it is still right that a new weapon must be exposed to the examination of positive international law.
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> . . .[T]here arises the question whether the act of atomic bombing is admitted by the laws and regulations respecting air raids, since the act is an aerial bombardment as a hostile act by military plane.
>
> No general treaty respecting air raids has been concluded. However, according to customary law recognized generally in international law with regard to a hostile act, a defended city and an undefended city are distinguished with regard to bombardment by land forces, and a defended place and an undefended place are distinguished with regard to bombardment by naval forces. Against the defended city and place, indiscriminate bombardment is permitted, while in the case of an undefended city and place bombardment is permitted only against combatant and military installations (military objectives) and bombardment is not permitted against non-combatants and non-mili-

56. 8 JAP. ANN. INT'L L. 1964 212 (1963).

tary installations (non-military objectives). Any contrary bombardment is necessarily regarded as an illegal act of hostility . . . .

With regard to air warfare, there are 'Draft Rules of Air Warfare'[57] . . . . In these provisions, stricter expressions are used than in the case of bombardment by land and naval forces, but what they mean is understood to be the same as the distinction between the defended city (place) and the undefended city (place). The Draft Rules of Air Warfare cannot directly be called positive law since they have not yet become effective as a treaty. However, international jurists regard the Draft Rules as authoritative with regard to air warfare[58] . . . . [T]he fundamental provisions of the Draft Rules are consistently in conformity with international laws and regulations, and customs at that time. Therefore, we can safely say that the prohibition of indiscriminate aerial bombardment on an undefended city and principle of military objective, which are provided for by the Draft Rules, are international customary law, also from the point that they are in common with the principle in land and sea warfare. Further, since the distinction of land, sea, and air warfare is made by the place and purpose of warfare, we think that there is also sufficient reason for existence of the argument that, regarding the aerial bombardment of a city on land, the laws and regulations respecting land warfare analogically apply since the aerial bombardment is made on land . . . . Of course, it is naturally anticipated that the aerial bombardment of a military objective is attended with the destruction of non-military objectives or casualty of non-combatants; and this is not illegal if it is an inevitable result accompanying the aerial bombardment directed at a non-military objective, and an aerial bombardment without distinction between military objectives and non-military objectives (the so-called blind aerial bombardment) is not permitted . . . . The power of injury and destruction of the atomic bomb is tremendous . . . , and even such small scale atomic bombs as those dropped on Hiroshima and Nagasaki discharge energy equivalent to a 20,000 ton TNT bomb in the past. If an atomic bomb of such power and destruction once explodes, it is clear that it brings almost the same result as complete destruction of a middle-sized city, to say nothing of indiscrimination of military objective and non-military objective. Therefore, the act of atomic bombing on an undefended city, setting aside that on a defended city, should be regarded in the same light as a blind aerial bombardment; and it must be said to be a hostile act contrary to international law of that day.

. . .Hiroshima and Nagasaki were not cities resisting a possible occupation attempt by land forces at that time. Further, . . . both cities did not come within purview of the defended city, since they were not in the pressing danger of enemy's occupation, *even if both cities were defended with anti-aircraft guns, etc.*, against air raids *and had military installations.* Also, . . . some 330,000 civilians in

57. D. SCHINDLER & J. TOMAN, *supra* note 7, at 147.

58. J. SPAIGHT, *supra* note 36, at 42-3; *see also* GREEN, *Aerial Considerations in the Law of Armed Conflict*, *supra* note 21 at n.21, ch. VII.

Hiroshima and 270,000 in Nagasaki maintained homes there, even *though there were so-called military objectives such as armed forces, military installations, and munitions factories in both cities.*[59]

Therefore, since an aerial bombardment with an atomic bomb brings the same result as a blind aerial bombardment from the tremendous power of destruction, even if the aerial bombardment has only a military objective as the target of its attack, it is proper to understand that an aerial bombardment with an atomic bomb on both cities of Hiroshima and Nagasaki was an illegal act of hostility as the indiscriminate aerial attack on undefended cities . . . .

During World War II, aerial bombardment was once made on the whole place where military objectives were concentrated, because it was impossible to confirm an independent military objective and attack it where munitions factories and military installations were concentrated in comparatively narrow places, and where defensive installations against air raids were very strong and solid; and there is an opinion regarding this as legal. Such aerial bombardment is called the aerial bombardment of an objective zone, and we cannot say there is no room for regarding it as legal, even if it passes the bounds of the principle of military objective, since the proportion of the destruction of non-military objective is small in comparison with the large military interests and necessity. However, the legal principle of the aerial bombardment of an objective zone cannot apply to the city of Hiroshima and the city of Nagasaki, since it is clear that both cities could not be said to be places where such military objective concentrate. [This statement appears to be somewhat inconsistent with previous recognition of the presence of guns, armed forces, military installations and munitions factories.]

Besides, the atomic bombing on both cities . . . is regarded as contrary to the principle of international law that the means which give unnecessary pain in war and inhumane means are prohibited as means of injuring the enemy . . . . [I]t goes without saying that such an easy analogy that the atomic bomb is necessarily prohibited since it has characteristics different from former weapons in the inhumanity of its efficiency, is not admitted . . . . *[H]owever great the inhumane result of the use of a weapon may be, the use of the weapon is not prohibited by international law, if it has a great military efficiency.* . . .

The destructive power of the atomic bomb is tremendous, but it is doubtful whether atomic bombing really had an appropriate military effect at that time and whether it was necessary. It is a deeply sorrowful reality that the atomic bombing of both cities . . . took the lives of many civilians, and that among the survivors there are people whose lives are still imperilled owing to the radial rays even today 18 years later. In this sense, it is not too much to say that the pain brought by the atomic bombs is severer than that from poison and poison-gas and we can say that the act of dropping such a cruel bomb is contrary to the fundamental principle of the laws of war that un-

59. It is arguable whether these are statements of good law.

necessary pain must not be given.[60]

It is not surprising that the Japanese court examined the issue from a somewhat subjective point of view. Many of the comments made could be used to sustain an argument to the contrary. Moreover, much of the reasoning is *ex post facto*, reflecting upon what had in fact occurred, and construes the facts solely from the 'victim's' perspective. The judgment does not prove that recourse to the atomic bombs at the end of the war, and for reasons prevailing at the time, was in fact contrary to the law of war as then understood.

When one considers Judge Pal's judgement, one is compelled to conclude that his general attitude to the charges levied and his comparison of the bomb with the practices of the Nazis completely ignores the circumstances of its use or the true character of the crimes committed by the accused. It is therefore disproportional. In fact, it is a little difficult to appreciate the legal reasoning that leads a High Court judge to feel that a crime—if indeed there was one—committed by the prosecutor constitutes sufficient ground to acquit an accused charged with a series of serious crimes. Moreover, bearing in mind the history of the Indian National Army[61] and India's struggle for independence still continuing at the time of the trial, one is tempted to enquire whether Pal's attitude does not reflect a certain amount of subjective racism.

To some extent it might be considered that the nuclear is a more developed and sophisticated form of the atomic weapon. It may is also arguable that the difference in potential between today's nuclear weapons and the atomic bombs of 1945 is such that the latter might almost be regarded as conventional weapons. Again, it must be recognized that, whatever may have been the situation in 1945, we now are aware of the various effects of nuclear explosions and our attitude to the legality of the weapon must be effected by this knowledge. At the same time, we dare not ignore the fact that, as with every other issue in international law, the practice of states must be taken into consideration, particularly the practice of those states most capable of using nuclear devices. In the *North Sea Continental Shelf Case*,[62] the World Court pointed out that for a rule to develop, it required, "a very widespread and representative participation . . . *provided it included that of States whose interests were especially effected.*" In this connection it should be recalled that the 1907 Hague Conventions included an 'all-participation clause.'[63] Both the English Prize Court in *The Mowe*,[64] and the Judicial Committee in *The*

60. Shimoda, *supra* note 56, at 235-42 (italics added).

61. *See* Green, *The Indian National Army Trials*, 11 MOD. L. REV. 47 (1948).

62. 3 I.C.J. 42 (1969).

63. *See, e.g.*, Convention IV, Art. 2: "The provisions in the Regulations. . . , as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention."

64. P. 1 (1915).

Blonde,[65] made it clear, however, that Convention VI relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities[66], could not be ignored even when one was dealing with belligerents, particularly non-maritime powers, who had not acceded or ratified the Convention. For the Judicial Committe in *The Blonde* this was not considered sufficient to invalidate the application of Convention VI:

> . . .are the 'belligerents', who are to be taken into account . . . , the belligerents merely who detain or suffer detention, or are they all the Powers who are simultaneously engaged in war . . . ? Is the adherence of all the belligerents, however remote from each other or unconnected with the ships and their detention, the consideration for the attaching of the obligation of any one of them, or are the mutual promises of the Powers concerned—that is, of the detainer and the detained—a sufficient consideration to bind them both together? Mutuality is of the essence of the Convention. Is that mutuality complete if the detaining sovereign and the sovereign of the ships detained ratify and abide by the Convention, or is it imperfect, so as to prevent the application of the Convention, unless and until other Powers, in no way concerned in the ships or their fortunes, but merely connected with one or both of those sovereigns in the general war, have likewise ratified and likewise abided by the Convention, whether or not they have ships or harbours, and whether or not they make or suffer captures, or are ever directly affected by maritime war at all?
>
> It is very hard to credit that the operation of an agreement, so earnestly directed to the attainment of the highest practical ends in war, should have been deliberately made to depend on the accidents or the procrastinations of diplomatic procedure in time of peace, even when no real relation existed between the condition and the consequence, between the ratification of all the parties and the detention of the ships of one of them.[67]

In view of this, it is irrelevant that the General Assembly, in 1961, adopted a Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons to the effect that:

> (a) The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations;
> (b) The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such is contrary to the rule of international law and to the laws of humanity;
> (c) The use of nuclear and thermo-nuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general, since the peoples of the world not involved in such a war will

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65. 1 A.C. 313 (1922) [hereinafter *The Blonde*].

66. D. SCHINDLER & J. TOMAN, *supra* note 7, at 703 (the 'all-participation clause' is Art. 6).

67. The Blonde, *supra* note 65, at 324.

> be subjected to all the evils generated by the use of such weapons;[68]
> (d) Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter[69] of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization. . . .[70]

Only the Soviet Union, among the nuclear powers, voted in favour of this Declaration, while China, France, South Africa and the United States opposed it, and Israel and Pakistan, believed to possess a nuclear potential, abstained. It, therefore, becomes difficult to consider such a Declaration to be in accord with State Practice or what the states effected believe to be of legal relevance. While the voting technically satisfied the requirement of Article 18,[71] it can not be said to represent either *opinio generalis* or *universalis*, or even *necessitatis*, for it only received 55 affirmative votes, with 20 against and 26 abstaining. Thus, there were only 9 more supporting the Resolution than there were opposing it or refusing to take a stance on it one way or the other. Even the 1972 Resolution[72] on the Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons which "solemly declares . . . the permanent prohibition of the use of nuclear weapons", was adopted by a mere 73 votes, with 4 opposed and 46 abstaining. Here, China and South Africa voted against it, while the others named above abstained. This was probably because, in addition to condemning nuclear weapons, the Resolution renounced "the use of force in all its forms and manifestations in international relations," hardly a principle to which they could express their opposition.

Other documents to which reference might be made include those of the International Conference of the Red Cross held in Vienna in 1965 on the Protection of Civilian Populations against the Dangers of Indiscriminate Warfare. It declared "that the general principles of the Law of War apply to nuclear and similar weapons."[73] Another is the 1969 Edinburgh Resolution of the Institute of International Law on the Distinction between Military Objectives and Non-military Objectives in general and particularly the Problems Associated with Weapons of Mass Destruction.[74] These documents have become somewhat historical in character, however, since they have been overrun by the Protocol adopted at Geneva

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68. *See, e.g.*, MCDOUGAL & FELICIANO, *supra* note 6.

69. *See Draft Articles Provisionally Accepted By The International Law Commission On Other Topics*, 18 I.L.M. 1568. (It is interesting that the International Law Commission makes no mention of the use of nuclear weapons in its draft articles on state responsibility.).

70. D. SCHINDLER & J. TOMAN, *supra* note 7, at 121 [G.A. Res. 1653(XVI)].

71. U.N. CHARTER art. 18, ¶ 2: "Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include recommendations with respect to the maintenance of international peace and security. . . ."

72. D. SCHINDLER & J. TOMAN, *supra* note 7, at 129 (G.A. Res. 2936).

73. *Id.* at 195.

74. *Id.* at 201.

in 1977 relating to the Protection of Victims of International Armed Conflicts (Protocol I).[75]

Before examining the position under Protocol I of 1977, it is necessary to refer to the 1976 Convention of the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques[76] since it is generally accepted that the discharge of nuclear weapons does in fact have long-term deleterious effects upon the environment. Article 1 in general terms states that "Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party."[77] It is important to note that while the Soviet Union, the United Kingdom and the United States are parties to this Convention, it has not been signed or ratified by China, France, Israel, Pakistan or South Africa.

As to Protocol I, Article 55 transfers the provision from the Environment Convention into a principle of humanitarian law in armed conflict: 1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. 2. Attacks against the natural environment by way of reprisals are prohibited.[78] Presumably, if the discharge of a nuclear weapon would only cause temporary, localised damage to the environment it might not fall within this ban.

The only direct reference in the Protocol to nuclear energy is to be found in Article 56 which relates to the protection of works and installations containing dangerous forces, and has nothing to do with the use of nuclear weapons as such.

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

2. The special protection against attack provided by paragraph 1 shall cease: . . . (b) for a nuclear electrical generating station only if it provides

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75. *Id.* at 132.
76. *Id.* at 131; *see, e.g.*, MCDOUGAL & FELICIANO, *supra* note 6, at 388-89.
77. D. SCHINDLER & J. TOMAN, *supra* note 7, at 132.
78. *Id.* at 583.

electric power in regular, significant and direct support of military operations and if such attack is *the only feasible way to terminate such support . . . .*[79]

It is clear that if an attack on such a nuclear installation would not effect the civilian population it would not be forbidden, while the reservation indicates that military necessity overrides humanitarian considerations even in this matter. It should be noted that the United Kingdom, when signing the Protocol, made a declaration regarding this provision to the effect ". . . that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time,"[80] thus giving them extensive discretion.

More significant from the point of view of the legality of nuclear weapons in armed conflict are the provisions with regard to the law to be applied in such a conflict, together with the provisions specially providing for protection of the civilian population and civilian objects. As has already been indicated, the Martens Clause, with its reference to "established custom, . . . principles of humanity and . . . the dictates of public conscience,"[81] has been embodied in Article 1, while Article 2 makes it clear that when the Protocol refers to 'rules of international law applicable in armed conflict' it "means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable in armed conflict."[82] In connection with the problem of the legality of nuclear weapons and the protection of the civilian population, Article 51 is most significant:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such . . . shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

. . . .

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(a) those which are not directed at a specific military objective

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79. *Id.* at 583-84 (italics added).
80. *Id.* at 634-35, ¶1(d).
81. *Id.* at 558.
82. *Id.*

(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

. . . .

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[83]

To prevent unnecessary civilian damage, Article 57, 2(a)(iii), requires those who plan or decide upon an attack to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[84] Here again, the United Kingdom declaration, already mentioned, goes further, in that it specifically asserts "in relation to paragraph 5(b) of Article 51 and paragraph (2)(a)(iii) of Article 57, that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack."[85] This would suggest that the reasons given for recourse to the atomic bombs in 1945, namely early termination of hostilities without further excessive loss of life, might be put forward to give effect to this declaration of understanding. It is also likely that, since the United Kingdom is a member of NATO, the other members of the alliance would adopt a similar approach.

Prima facie, it would appear that these provisions render the use of nuclear weapons in armed conflict contrary to the new treaty law of war. However, the Protocol was directed at the Reaffirmation and *Development* of Humanitarian Law in Armed Conflict, so that any provision aimed at its development and not merely at its codification would only apply, unless already established as a rule of customary law, to those parties which ratify it. It is therefore important that, of the nuclear or allegedly potential nuclear powers, neither Israel nor South Africa has signed the Protocol, and only China, of the major nuclear powers, has acceded to it. If the Protocol's provisions with regard to protection of the environ-

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83. *Id.* at 581.
84. *Id.* at 584-85.
85. *Id.* at 635, ¶1(e).

ment, long-term damage and the like are new developments, they are insignificant from our point of view. If the provisions with regard to indiscriminate attack, disproportionate casualties or unnecessary suffering are merely declaratory of existing law, then the arguments presented earlier with regard to the atomic weapon and its legality would equally apply.

More importantly, however, is that, in so far as the major powers are concerned, it was never intended that the Protocol should deal in any way with the nuclear weapon. In his *Droit des Conflicts Armes* Professor Rousseau states:

> Les armes nucléaires ont été exclues du champ des débats de la Conférence qui a abouti à l'adoption des protocoles additionels de 1977 et les trois grandes Puissances nucléaires (Etats-Unis, Grande-Bretagne et U.R.S.S.) ont confirmé par des déclarations unilatérales que les dispositions du protocole numbre 1 ne devaient pas être interprétées comme s'appliquant à l'emploi des armes nucléaires.[86]

It is of interest to note that when the later conference on conventional weapons was held,[87] there was no suggestion that any attempt should be made to proscribe the nuclear arm. Even before this, the International Committee of the Red Cross (ICRC) had stated in connection with their drafts, which became the subject of the humanitarian law conference and ultimately the 1977 Protocols,[88] that "[p]roblems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Protocols the ICRC does not intend to broach these problems . . . ."[89] As early as the thirteenth session of the Conference the United Kingdom endorsed this approach and

> commented that it was on the assumption that the draft Protocols would not affect those problems that the UK had worked and would continue to work towards final agreement on the Protocols. The United States expressed a similar understanding, expressing the view that "such problems were beyond the scope of the Conference." The Soviet Union also expressed its concurrence in the ICRC's statement.[90]

The Protocol was ultimately adopted by consensus, at which time the United States made a declaration of understanding:

> From the outset of the Conference, it has been our understanding that rules to be developed have been designed with a view to conventional weapons. During the course of the conference we did not discuss the use of nuclear weapons in warfare. We recognize that nuclear weapons are the subject of separate negotiations and agreements, and further

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86. ROUSSEAU, at 127 (1983).
87. *See supra notes* 22 & 23 and accompanying text.
88. Protocol II concerning non-international conflicts is irrelevant in this discussion.
89. BOTHE, *supra note* 16, at 188.
90. D. SCHINDLER & J. TOMAN, *supra* note 7, at 551.

> that their use in warfare is governed by the present principles of international law. It is the understanding of the United States that *the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.* We further believe that the problem of regulation of nuclear weapons remains an urgent challenge to all nations which must be dealt with in other forums and by other agreements.[91]

Similar statements were made by France and the United Kingdom, and no party to the conference, with the exception of a written statement submitted by India in the final Plenary, raised any objection to these understandings. It is clear that nothing in the Protocol, whatever its form or implied content, can be taken to apply to nuclear weapons. This was reiterated by the United Kingdom and the United States when they signed the Protocol. The former declared "that the *new rules* introduced by the Protocol are not intended to have any effect on and *do not regulate or prohibit the use of nuclear weapons.*"[92] The United States declared that "it is . . . [our] understanding . . . that *the rules established by the protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.*"[93]

In the light of the statements made by the three major powers and France it is clear that if and when any of them ratify Protocol I, the party ratifing will still be free of any restriction flowing from the Protocol as far as the use of nuclear weapons is concerned. Although there is no treaty banning nuclear weapons, and although the major nuclear powers have reiterated their conviction that no black letter law exists proscribing their use as such, it must be accepted that nuclear weapons, like any others, are subject to the normal rules regarding proportionality,[94] indiscriminate damage, unnecessary suffering and the protection of civilians. Provided these requirements, and particularly the rule on proportionality,[95] are met it would seem that in the eyes of the law of armed conflict, the nuclear weapon is as much a legitimate weapon of war when properly used as is any conventional weapon. As with any conventional weapon, improper

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91. BOTHE, *supra* note 16, at 189 (italics added).

92. D. SCHINDLER & J. TOMAN, *supra* note 7, at 635, ¶1(i) (italics added).

93. *Id.* at 636 (italics added).

94. *See, e.g.*, Mallison, *The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars*, 36 GEO. WASH. L. REV. 308, 333 (1967).

95. MCDOUGAL & FELICIANO, *supra* note 6, at 218:

> . . .proportionality . . .is but another application of the principle of economy of coercion . . . . There is increasing recognition that the requirements of necessity and proportionality as ancillary prescriptions (in slightly lower-order generalization) of the basic community policy prohibiting change by violence, can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in particular context. What remains to be stressed is that reasonableness in particular context does not mean arbitrariness in decision but in fact its exact opposite, the disciplined ascription of policy import to varying factors in appraising their operational and functional significance for community goals in given instances of coercion.

use of the nuclear weapon would constitute a breach of the law and a war crime amenable to trial by any authority still in existence and willing to institute the necessary proceedings. However, there is probably little to be gained in pursing the recent suggestion[96] that it might be worthwhile for

> one of the political organs of the United Nations to ask the Court for an Advisory Opinion on the present meaning of "civilised nations" in Article 38(1)(c) of its Statute. The request might be formulated under three heads:

(1) Can a nation which *prepares*, if only contingently, for use of means of mechanised barbarism and co-extermination be considered as being civilised?

(2) *A fortiori*, can this description be applied to any nation which, in any circumstances, actually *resorts* to the use of such weapons?

(3) Would the Court subscribe to the view, expressed by Alberico Gentili four centuries ago, on the unlawfulness of any weapons which are unacceptable "because war, a contest between men, through these acts is made a struggle of demons"?[97]

This ignores the fact that the General Assembly is made up of state representatives, and, while the nuclear powers may be in a minority, they can be relied upon to ensure that they and their friends will constitute a one-third blocking minority. Moreover, even those not yet possessing nuclear weapons, but hoping to do so in the future, are unlikely to agree to ask for any Opinion which might label them even potentially 'uncivilized'.

96. 4 SCHWARZENBERGER, INTERNATIONAL LAW 732-33 (1986).
97. 2 DE JURE BELLI ch. VI, ¶261 (1612) (Carnegie trans. 1933).

SYMPOSIUM — INTERNATIONAL DEVELOPMENT AGENCIES (IDAs), HUMAN RIGHTS AND ENVIRONMENTAL CONSIDERATIONS

Human Rights and Environmental Considerations in the Lending Policies of International Development Agencies — An Introduction

VED P. NANDA*

I. INTRODUCTION

After decades of development efforts, economic development still remains a distant goal for many developing countries. The World Bank's *World Development Report 1988*[1] provides a vivid description of the situation:

> Some African and highly indebted, middle-income countries have suffered significant declines in per capita income . . . . Their investments have fallen to levels at which even minimal replacement may no longer occur in important sectors of their economies . . . . Their debts are growing, but they still face negative net resource transfers because debt service obligations exceed the limited amounts of new financing. In some developing countries the severity of this prolonged economic slump already surpasses that of the Great Depression in the industrial countries . . . , and in many countries poverty is on the rise.[2]

The World Bank prescriptions to improve economic conditions in developing countries include restructuring of their economic policies[3] and

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1. THE WORLD BANK, *World Development Report 1988* (1988).
2. *Id.* at 2-3.
3. *See id.* at 4.

reducing the net transfer of their financial resources.[4] According to the World Bank, a reduction in the resource drain and increased investment in the developing countries will support growth comparable with that of the period during the 1950s and 1960s.[5]

This plan is sound but incomplete, for critics argue that the International Development Agencies (IDAs) have not adequately addressed their role in promoting and protecting human rights and in furthering sound environmental policies in developing countries.[6] The focus of this inquiry is on why and how the IDAs should address these concerns in their decision making.

II. THE RIGHT TO DEVELOPMENT

In the recent past, one further perspective has entered the discourse on development, that of the "right to development."[7] Although developmental activities in most developing countries are likely to remain focused on economic growth and capital formation, a marked shift from the 1950s and 1960s, when development was equated with economic growth, has occurred during the last decade.[8] This shift, which emphasizes the well-being of the human person, is now reflected in the U.N. Declaration on the Right to Development (Declaration),[9] adopted by the U.N. General Assembly in December 1986.

In the preamble, the General Assembly recognizes that "development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits" resulting from it.[10] The Declaration proclaims that "[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development."[11]

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4. *See id.* at 4-5.

5. *See id.*

6. *See* the articles by Professors Paul and Plater, *infra*.

7. *See e.g., Symposium — Development as an Emerging Human Right*, 15 CAL. WES. INT'L L.J. 429 (1985); Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HUM. RTS. Y.B. 3 (1988); Nanda, *Development as an Emerging Human Right Under International Law*, 13 DEN. J. INT'L L. & POL'Y 161 (1984), and the authorities cited *id.* at 161 n. 1.

8. *See, e.g.*, Nanda, *supra* note 7, ns. 4-12 and accompanying text.

9. Declaration on the Right to Development, G.A. Res. 41/128, 41 U.N. GAOR Supp. Annex (No. 53) at 186, U.N. Doc. A/41/53 (1986) [hereinafter cited as Res. 41/128]. The discussion on the right to development began in the U.N. Commission on Human Rights in 1977, *see U.N. Commission on Human Rights: Report on the Thirty-Third Session*, 33 U.N. ESCOR Supp. (No. 6) at 10-12, U.N. Doc. E/5927 (1977). Four years later, the Commission established a working group, pursuant to its decision to do so, *see U.N. Commission on Human Rights: Report on the Thirty-Seventh Session*, 37 U.N. ESCOR Supp. (No. 5) at 237, U.N. Doc. E/1981/25 (1981).

10. Res. 41/128, *supra* note 9, at second preambular para.

11. *Id.* at art. 2(1).

As a concept, the right to development raises difficult questions concerning its basis, content, beneficiaries and holders, obligors, the nature of the obligation, and enforcement.[12] The Declaration provides little assistance in addressing these questions, much less in answering them; it is too vague and undefined, and is no model of clarity.[13] Consequently, the concept remains amorphous. Further efforts at the United Nations to refine the concept and recommend specific measures for its operationalization and implementation have seemingly reached an impasse.[14]

However, an expert group established by the United Nations to work on the implementation of the right to development reported at its recent meeting in January 1988 that it "attach[ed] great importance to the replies [on the implementation of the Declaration] which may be given by international financial institutions," such as the World Bank and the International Monetary Fund.[15] It seems likely that the Declaration will become a rallying point for those seeking to establish an inseparable link between human rights and development. Thus, the lack of clarity in the content of the right to development concept notwithstanding, the concept is likely to gain wider acceptance, just as some of its predecessors such as self-determination and the New International Economic Order have done. Thus, the right to development could play a significant role in the future of development theory and practice.

III. IDAs AND HUMAN RIGHTS

To return to the critical question, why and how should the IDAs address human rights concerns in their activities? Preceding that inquiry, however, is another basic question: do the mandates under which these agencies operate permit them to take into account human rights considerations in their lending and other activities?

As the author of the first article in this symposium, the general counsel of the World Bank, Ibrahim Shihata, reminds us, the World Bank is "explicitly prohibited by its Articles of Agreement from interfering in the political affairs of its members."[16] He acknowledges, however, that human rights issues may become relevant in the World Bank's decisions on lending to a particular country because of the effects of political situations "on the country's economy or on the feasibility of project implementation

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12. For an insightful discussion, see Alston, *supra* note 7, at 20-40. Recently, there has been an attempt to "put the right to food on the agenda of national and intenational food agencies." THE RIGHT TO FOOD 7 (P. Alston & K. Tomasevski eds. 1984).

13. The author is currently working on a piece, co-authored with David Penna, entitled "Difficulty in Operationalizing the Declaration on the Right to Development," analyzing the right to development, especially in light of the Declaration.

14. *See Report of the Working Group of Governmental Experts on the Right to Development*, 44 U.N. ESCOR ____, paras. 40, 42, U.N. Doc. E/CN.4/1988/10, at 9-12 (1988). The United States withdrew from the Working Group in December 1987. *See id.*, para. 6.

15. *See id.* at para. 42(1).

16. *See* Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements, infra* at 40 [hereinafter cited as Shihata].

or monitoring."[17] Such relevance notwithstanding, he cautions that "the degree of respect paid by a government to human rights cannot be considered in itself a basis for the Bank's decision to make loans to that government or for the voting of its Executive Directors in every case."[18]

In his article, Mr. Shihata recounts the Bank's "significant role" in promoting human rights, especially the right to development, since the beneficiaries of Bank-financed projects in agriculture, irrigation, rural development and industry, amounting to almost $150 billion in developmental assistance to developing countries, are the individuals.[19]

He concludes by suggesting that the material "basic needs" and civil rights are both "basic to human development and happiness," and that "no balanced development can be achieved without the realization of a minimum degree of all human rights, material or otherwise, in an environment that allows each people to preserve their culture while continuously improving their living standards."[20] Consequently, he admits that the Bank has to be "concerned with the broad effect of its loans on the welfare of the beneficiary individuals."[21]

This growing awareness of the importance of human rights considerations in the Bank's activities can be viewed as an important step furthering the reach of the right to development as well as other human rights. Likewise, as the author of the second article in this symposium, Professor James Paul, reminds us, failure to take rights seriously at every stage of the project cycle is likely to result in a flawed project, for "effective, self-reliant participation is essential to the design as well as the implementation, monitoring, and regulation of all development projects which affect particular groups of people in particular ways."[22]

The increased participation of project-affected peoples in development decisions can only serve to reinforce and protect more "traditional" civil and political rights. Such procedures serve to emphasize the interconnection between civil and political as well as economic, social and cultural rights, which has been recently reaffirmed in the right to development.[23]

Interrelationships are present not only between these various rights, but also between the organizations that are responsible for assisting in their implementation. No international institution can today deny that it has a role in promoting human rights. Professor Paul argues that "[t]he duty to protect and promote rights must now be seen as a mandatory obligation imposed by law. This duty should be assumed by IDAs as a

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17. *Id.* at 47.
18. *Id.*
19. *See id.* at 49.
20. *Id.* at 65.
21. *Id.* at 66.
22. *See* Paul, *International Development Agencies, Human Rights and Humane Development Projects*, *infra* at 70 (1988) [hereinafter cited as Paul].
23. Res. 41/128, *supra* note 9.

matter of sound policy and based on both lessons of experience and a general, international consensus regarding both the ends and means of 'development.' "[24]

By participating in the promotion of human rights such as the right to development, these international agencies can take their rightful place in the debate that will help define the contours of the right to development and other rights. It is only through such a dialogue between theory and practice, politicians and technicians, that such rights can be realized. Appropriately, Professor Paul examines a number of measures the IDAs can take to meet their obligations, and makes thoughtful and practical suggestions toward that end.[25]

IV. IDAs AND ENVIRONMENTAL CONSIDERATIONS

The recommendation in the preceding section, that IDAs' activities should take into consideration human rights, applies with equal force to environmental considerations as well. However, while the effect that programs financed by IDAs have had on the global environment is clear, the effect of environmental considerations upon IDA planning is, unfortunately, unclear even today.

There have undoubtedly been some positive developments in the recent past, indicating that planners would seriously consider the environmental effects of economic planning. To illustrate, an environmental staff has now been assembled in the World Bank,[26] which has created several environmental units; other IDAs have also begun to address environmental concerns. The timing is, however, important, for all this occurred after unilateral efforts were announced by various nations to take environmental impacts into consideration in determining their directors' approval of IDA lending decisions on specific projects.[27] Still, environmental concerns are allegedly being ignored, and projects with controversial environmental impacts approved and constructed.[28]

Ignorance of such concerns is surely short-sighted, as Professor Zygmund Plater demonstrates in his paper, the last paper in this symposium, by illustrating how environmental problems can prevent and have

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24. *See* Paul, *supra* note 22, at 69.

25. *See id.* at 109-114.

26. NROC seeks reversal of reductions in environmental staff, 11 Int'l Env't Rep. (BNA) 14 (Jan. 13, 1988).

27. *See* Kasten, *Hand in Hand: Economic Development and Environmental Protection*, 18 Env. L. Rep. 10047-49 (1988); Int'l Env't Rep. (BNA) 538-39 (Oct. 12, 1988) (Canada Urges Environmental Assessment by World Bank in Development Decisions).

28. *See, e.g.*, 11 Int'l Env't Rep. (BNA), Curr. Rep. 191 (March 9, 1988) (Brazilian Indians opposing World Bank-supported dam projects); *id.* at 29 (Jan. 13, 1988) (Indian environmental groups protest environmental and social devastation caused by energy and coal projects in India); *see also id.* at 14 (environmental group protests reduction in environmental staff at World Bank); *cf. id.* at 388 (July 13, 1988)(World Bank official intends to invite consultations with NGO environmental groups).

in fact prevented developmental projects from achieving their goals.[29] He provides a useful classification of potential environmental impacts,[30] explains the reasons for the traditional IDA disinterest with environmental impacts,[31] and identifies environmental costs which are typically ignored by IDAs.[32] Even if these costs are difficult to quantify, they are important since they have substantial impacts on project performance.

Professor Plater finds validity in environmentalists' criticism that the traditional reluctance of IDAs to confront possible environmental impacts early in the planning of projects is, in part, institutional.[33] Prior to 1987, an environmental assessment was only provided during the third year of the project's existence.[34] The importance of environmental concerns, particularly those that are difficult to quantify at such a late stage in the project's development, were typically played down by those who had guided the project through its initial stages. Further, since most environmental concerns were also typically reviewed on a project rather than a sectoral basis, environmental problems were often dealt with in a piecemeal fashion, and were never meaningfully integrated into the "mission" of the IDAs.[35] This is not surprising since during the formative years of the IDAs environmental concerns and development concerns were publicly perceived as antagonistic,[36] especially because many developing nations had only limited resources available to them, and to allocate any funds to environmental considerations was considered a misallocation of scarce resources.[37]

Several factors have interacted to change this perception. First, the outright failure of some projects due to inadequate consideration of environmental and human factors has brought about a belated recognition of the need to include "environmental costs" in assessing the feasibility of projects.[38] Second, increased environmental awareness in many developed nations has brought about political pressure by donor governments for environmentally sound development.[39]

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29. Plater, *Damning the Third World: Multilateral Development Banks, Environmental Diseconomies and International Reform Pressures on the Lending Process, infra* at 121 [hereinafter cited as Plater].

30. *See id.* at 129-140.

31. *See id.* at 137-144.

32. For a discussion of three classes of environmental costs, see *id.* at 129-140.

33. *See id.* at 137-146.

34. *See id.* at 139; Rich, *The Multilateral Development Banks, Environmental Policy, and the United States*, 12 ECOL. L. Q. 681, 708 (1985).

35. *See* Rich, *supra* note 34, at 708-709.

36. *See* discussion of environmentalism in Plater, *supra* note 29, at 125.

37. *See, e.g.*, Almeida, Beckerman, Sachs & Corea, *Environment and Development — The Founex Report*, INT'L CONCIL. (Jan. 1972) (discussing the tension between developing countries, which desired a greater degree of resource exploitation, and developed nations, which urged a greater degree of environmental control, preceding the 1972 U.N. Conference on the Human Environment in Stockholm).

38. *See* Plater, *supra* note 29, at 142.

39. *See* Kasten, *supra* note 27; Rich *supra* note 34.

Some have criticized such pressure or the "politicizing" of development issues as they would allege, primarily on the ground that the charters of organizations such as the World Bank seemingly attempt to insulate development projects by stating that rejection of funding should be based solely upon economic considerations.[40] However, the differentiation between environmental and economic issues is certainly not clear, and environmental concerns are probably no more "political" than economic concerns. Typically, today, environmental and economic, as well as social, issues have political implications, and debate on any one of these topics can be described as "politicized" to a certain extent. Further, the fact that environmental impacts, even ones difficult to quantify, can have a serious effect on the viability of projects,[41] suggests that it is appropriate for the board of governors of IDAs to take environmental factors into consideration in determining the utility of a project.

Such a "unilateral" approach where a state or group of states applies pressure on the IDAs' lending decisions on environmental grounds is likely to be criticized by those who see rejection of their project for such reasons as part of the 'agenda' of one or a few powerful states. Professor Plater observes that "[t]he definition of limits for the unilateral pressuring phenomenon . . . may well present a continuing perplex for the future."[42] In this context it is worth noting that, contrary to the perception that powerful states are using a unilateral approach in furtherance of their own "agenda," most lending decisions of the governors of IDAs are taken by consensus.[43] Thus a process of persuasion must take place. While in any consensus, some members are "more equal" than others, it has recently been noted by the newly appointed head of the World Bank's Environmental Department, Kenneth W. Piddington, that a "multilateral approach is taking a higher profile."[44]

A more severe criticism of traditional IDA assessment of projects concludes that past performance "calls into question the ecological soundness and sustainability of the development model promoted by the banks."[45] Reliance upon large-scale, revenue-generating, export-oriented projects that are justifiable upon neoclassical economic theory has in many cases proved inadequate in accounting for environmental factors.[46] In large part, this may be due to the difficulty of reducing future environmental benefits to "present value."[47] This calls for modification of such analysis to ensure environmentally sound projects as well as "sustainable

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40. *See* Shihata, *supra* note 16, at 47.

41. *See* Plater, *supra* note 29, citing examples at 129-140.

42. *See* the discussion of unilateral pressures in Plater, *supra* note 29, at 152-155.

43. *See* Rich, *supra* note 34, at 684 n. 20. For the structure and operation of these agencies, see *id.*, at 682-685.

44. World Bank's Environmental Chief sees shift to multilateral resolution of global issues, 11 Int'l Env't Rep. (BNA) 538 (Oct. 12, 1988).

45. Rich, *supra* note 34, at 736 (citation omitted).

46. *Id.*

47. *See id.* at 737.

development."

Nor can the economic or environmental effects of a project easily be separated from their social effects.[48] When a project significantly alters the ecological balance in an area, traditional social patterns are necessarily changed, often drastically.[49] Too often such disruptions are ignored or calculated merely in terms of employment or investment opportunities rather than in terms of adverse cultural impacts, increased risk of crime, alcohol abuse, or "loss of sense of purpose" on the part of affected individuals.

Perhaps some of these recent events suggest the direction in which a solution must be sought. First, methods must be developed to integrate environmental concerns into the early stages of the project planning and evaluation process. Further, since past environmental impacts, social impacts and poor economic performance have plagued many development projects, developmental models that concentrate on large, expensive, export-generating projects must be revised in light of more recent experience which suggests that smaller projects aimed at increasing self-sufficiency, particularly in agriculture, will have more beneficial environmental, social and economic impacts. Related to this point is the recognition that environmental, social and economic concerns are interrelated, and all are vital to the success of development projects.

The enshrinement of these principles as a multilateral initiative by amending instruments and charters of the IDAs is desirable since inputs from a wide variety of sources, including donor and developing nations as well as NGOs and the IDAs' own staff, will assist in achieving a consensus on these important issues as well as assure that the revisions reflect the interests of all concerned parties.

An additional advantage of such consensus could be the prevention of the financing of environmentally unsound projects even on a bilateral basis. For example, after the World Bank refused to finance certain projects in Thailand because of adverse environmental and social impacts, it was reported that Japan was considering financing the projects, despite the lack of any assurance of environmental safeguards.[50] One Japanese environmentalist urged the Japanese government to learn from the international pressure and "face its environmental responsibilities."[51] Indeed, such pressures are probably vital to forging an international consensus on these issues. Fortunately, some success has already been achieved, as evidenced by the World Bank's refusal to fund the Thai project.

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48. *See* Pallemaerts, *Development, Conservation, and Indigenous Rights in Brazil*, 8 HUM. RTS. Q. 374, 386 (1986), discussing the destruction of the environment of Amazonian Indians and the effect on their lifestyle.

49. *See id.*

50. Japan said it is planning to finance projects dropped by the World Bank, 11 Int'l Env't Rep.(BNA) 539 (Oct 12, 1988).

51. *Id.*

V. CONCLUSION

The IDA recognition of the usefulness of human rights and environmental considerations in their activities constitutes a welcome shift from their past practices. For such considerations to be taken seriously, institutional reforms in IDAs which have already begun must continue and must succeed. Of equal importance is the continuing vigilant role of human rights and environmental NGOs whose inexorable efforts have borne some fruit. Legal scholars must also contribute in further clarifying the legal frameworks within which this essential change can take place.

The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements

IBRAHIM F. I. SHIHATA*

I. INTRODUCTION

In the beginning, the International Bank for Reconstruction and Development (the World Bank) and the institutions it helped create[1] had one objective in common, the promotion and financing of investment for productive purposes. For example, in the late forties and the early fifties, the World Bank financed the reconstruction of Europe and Japan. However, the World Bank has since expanded its scope. Today, it is the leading center for research, advisory services, and finance for the advancement of developing countries. Indeed, the World Bank Group, the International Development Association (IDA) and the International Finance Corporation (IFC), have financed efforts to fulfill the universal right to economic development and a broad range of human rights associated therewith in the amount of 203 billion dollars.

However, the Bank's leading role in the promotion of these rights should not be confused, with a role that the Bank has refused to play. The Bank does not interfere in the political affairs of its members, including their positions on political rights[2] because it falls outside the scope of the Bank's authority as an international financial institution.

Unfortunately, the World Bank has been judged at times as promoting the political beliefs of borrowing countries due to the Bank's silence on the subject. This silence has lead to some domestic legislation attempting to force the Bank to refrain from lending to countries which consistently violate various rights. Indeed, in the past, the debate centered around the Bank's failure to implement U.N. recommendations requesting it to withhold assistance from certain countries, and around U.S. legislation instructing the U.S. Executive Director on the Bank's Board to

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* Vice President and General Counsel, World Bank; Secretary-General, International Centre for Settlement of Investment Disputes. This article is based on a paper presented by the author to the International third World Legal Studies Association Panel on the World Bank, Development Projects, and Human Rights, at Miami, Florida on January 8, 1988.

1. These institutions are the International Finance Corporation (IFC), which was established in 1956; the International Development Association (IDA), set up in 1960; the International Centre for Settlement of Investment Disputes (ICSID), created in 1966; and the Multilateral Investment Guarantee Agency (MIGA), whose constituent convention is expected to enter into force in the near future.

2. *See, e.g.*, Marmorstein, *World Bank Power to Consider Human Rights Factors in Loan Decisions*, 13 J. INT'L. L. & ECON. 113 (1978).

oppose loans to certain countries. However, the Bank's involvement in human rights issues goes far beyond the political arena where it is prohibited from interfering. The Bank's involvement encompasses such varied subjects as the alleviation of poverty, the fulfillment of basic human needs for nutrition, safe water, education, health and housing, the concern for resettlement of people affected by large development projects and of tribal peoples, the role of women in development, and the avoidance of the negative impact of development on the environment. This paper examines in detail the Bank's impressive record in these aspects of human rights after explaining the limitations on the Bank's action concerning the promotion of civil and political human rights.

II. INSTITUTIONAL LIMITATIONS ON THE POWER OF THE WORLD BANK TO CONSIDER CIVIL AND POLITICAL HUMAN RIGHTS ISSUES - A LEGAL ANALYSIS

The preliminary issue of whether the World Bank can take into account civil and political human rights considerations in its lending and other activities[3] requires an analysis not only of the specialized functions of the World Bank but also of the other limitations imposed by its charter as well as by other applicable instruments of international law. Such analysis necessarily addresses issues such as the binding force of the various resolutions of the U. N. General Assembly related to human rights and more specifically, their particular relevance to the World Bank. While the latter is a specialized agency of the United Nations, it is explicitly prohibited by its Articles of Agreement from interfering in the political affairs of its members.

A. The World Bank's Specific Responsibilities and Functions

The World Bank is entrusted with specific responsibilities and functions. The Bank's purposes are set forth in its Articles of Agreement. They include, the financing of "reconstruction and development of territories of members", the promotion of private foreign investment and supplementing them by its own financing, the promotion of the "long-range, balanced growth of international trade and the maintenance of equilibrium in balances of payments," through the provision of loans and guarantees, and the encouragement of international investment for productive purposes.[4] These objectives, all related to economic growth and development, have enabled the Bank to become the leading multilateral development lending institution in the world, who together with IDA, have financed a wide spectrum of development activities too diverse to be discussed here.

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3. *See id.*; Kneller, *Human Rights, Politics, and the Multilateral Development Banks*, 6 YALE STUD. WORLD PUB. ORD. 361 (1980).

4. *See* Articles of the International Bank for Reconstruction and Development, Dec. 27, 1945, art. 1., 2 U.N.T.S. 134. The same Article provides that the Bank "shall be guided in all its decisions by the purpose set forth above."

B. *The Legal Effect of U.N. General Assembly Resolutions*

The controversy over the legal effect and binding force of U.N. General Assembly resolutions is well known.[5] However, there is little disagreement that resolutions do not have the same legal value of effective international conventions and cannot instantly establish rules of international custom even when the resolutions are normative in nature or are a general declaration. It is also clear, as stated by the *Institut de Droit International*[6], that certain provisions of a General Assembly resolution, especially those which purport to have a normative function or purpose, may represent a mere restatement of existing customary law or may contribute over time to the evolution of new international custom. For example, resolutions adopted without a significant dissent, such as those related to human rights, are likely to play such roles. There is a need, however, to find in each case additional evidence to determine the legal effect of that resolution. To use the terms of the *Institut*, it must be determined whether the resolution is "law-declaring" or "law-developing".[7] This is quite different from the case of international conventions, including the international covenants on human rights whose texts were approved by the U.N. General Assembly,[8] as these are treaties in the full

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5. For the view that even the Universal Declaration of Human Rights does not have a legally binding effect, see Sloan, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*, 1948 BRIT. Y.B. INT'L. L. 1, 31; Lauterpacht, *The Universal Declaration of Human Rights*, 1948 Brit. Y.B. Int'l. L. 354, 369; O. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS 190 (1966); Ermacora, *Human Rights and Domestic Jurisdiction*, in 124 RECUEIL DES COURS 371, 427-30 (1968). Other writers state that the Declaration constitutes a binding obligation for Member States of the U.N. and forms part of customary international law or even *jus cogens*. *See* remarks of M. McDougal at the AM. SOC'Y INT'L LAW PROC. 329 (April 26-28, 1979); *see also* P. SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 54-55 (1983). Others, while maintaining that the resolutions of the General Assembly incorporating declarations "are not in themselves acts creative of new rules of international law" do, however, ascribe a "legal function" to them which is not negligible. *See* M. SORENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW 162 (1968).

6. The resolution was adopted by the Institute of International Law at its Cairo Session on Sept. 13-22, 1987. In connection with its work on non-contractual instruments which had a normative function or objective, the Institute gave special attention to the resolutions of the U.N. General Assembly. A draft Resolution on "Resolutions of the General Assembly of the United Nations" containing twenty-seven "Provisional Conclusions" was presented to the Institut at its 1985 Session. The Resolution as adopted contains twenty-six Conclusions.

7. Conclusion 6 of the Institut's Resolution prescribes, *inter alia*, the following elements to identify the category to which a resolution belongs:
(a) the intent and expectations of States;
(b) respect for procedural standards and requirements;
(c) the text of the resolution;
(d) the extent of support for the resolution;
(e) the context in which the resolution was elaborated and adopted, including relevant political factors;
(f) any implementing procedures provided by the resolution.

8. *The International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1967). This Covenant entered

sense of the term. Once such covenants enter into force, they are fully binding on the parties thereto and may also contribute to the evolution of customary international law.[9] The substantive rules embodied in international conventions on human rights may thus reproduce or contribute to the making of international law rules which are not only valid *erga omnes* but are also peremptory in nature (*jus cogens*).[10]

The question of the legal effect of U.N. General Assembly resolutions, including its declarations on human rights, has a special relevance to the World Bank. In making decisions on loans and guarantees relating to matters directly within the competence of "any general international organization" or of "public international organizations having specialized responsibilities in related fields," the Bank is required by Article V, section 8(b) of its Articles of Agreement to "give consideration" to the views and recommendations of such organizations. However, pursuant to Article V, section 8(a) of the Bank's Articles of Agreement, such cooperation must be consistent with the terms of the Bank's Articles of Agreement and cannot involve a modification of these Articles, unless they have been amended according to their terms.

Details of the Bank's status as a specialized agency of the U.N. are spelled out in its Relationship Agreement with the U.N. This Agreement clearly states that,

> [t]he Bank is a specialized agency established by agreement among its member governments and having wide international responsibilities, as defined in its Articles of Agreement, in economic and related fields within the meaning of Article 57 of the Charter of the United Nations. By reason of the nature of its international responsibilities and the terms of its Articles of Agreement, *the Bank is, and is required to function as, an independent organization.*(emphasis added)[11]

The Bank is required under the Relationship Agreement to take note of

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into force on January 3, 1976. As of January 1, 1988, 91 States have adhered to this Covenant. *The International Covenant on Civil and Political Rights*, G.A. Res. 2200, 21 U.N. GOAR Supp. (No. 16) at 52. This Covenant entered into force on March 23, 1976. As of January 1, 1988, 87 States have adhered to it. *See* HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 3 (1983). *See also*, HENKIN, PUGH, SCHACHTER & SMIT, INTERNATIONAL LAW, CASES AND MATERIALS 990 (2d ed. 1987).

9. *See* Article 38 of the Vienna Convention on the Law of Treaties which provides: "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such." *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, U.N. Doc. A/CONF/39/27, 1971. *See also*, Shihata, *The Treaty as a Custom Making Instrument*, 22 EG. REV. INT'L L. 51 (1966); R. Baxter, *Treaties and Customs*, in 129 RECUEIL DES COURS 25, 75 (1970).

10. Barile, *The Protection of Human Rights in Article 60, Paragraph 5 of the Vienna Convention on the Law of Treaties*, in STUDI IN ONORE DI ROBERTO AGO 1, 4-5 (1987).

11. Agreement Between the United Nations and the International Bank for Reconstruction and Development, Nov. 15, 1947, art. 1(2), 16 U.N.T.S. 346 (Emphasis added) [hereinafter agreement]. *See also*, 265 U.N.T.S. 314 and 394 U.N.T.S. 222 for similar agreements related to IFC and IDA respectively.

the obligations assumed by its members. The Bank is also required to have "due regard for decisions of the Security Council under Articles 41 and 42 of the United Nations Charter,"[12] in the conduct of its activites. However, the situation is quite different as far as General Assembly resolutions are concerned. For the latter, the applicable provisions in the Relationship Agreement only state the following:

> 1. The United Nations and the Bank shall consult together and exchange views on matters of mutual interest.
> 2. Neither organization, nor any of their subsidiary bodies, will present any formal recommendations to the other without reasonable prior consultation with regard thereto. Any formal recommendations made by either organization after such consultation will be considered as soon as possible by the appropriate organ of the other.
> 3. The United Nations recognizes that the action to be taken by the bank on any loan is a matter to be determined by the independent exercise of the Bank's own judgment in accordance with the Bank's Articles of Agreement. The United Nations recognizes, therefore, that it would be sound policy to refrain from making recommendations to the Bank with respect to particular loans or with respect to terms or conditions of financing by the Bank. The Bank recognizes that the United Nations and its organs may appropriately make recommendations with respect to the technical aspects of reconstruction or development plans, programmes or projects.[13]

The first test of the effect of a U.N. resolution on the World Bank occured in the 1960s. In the sixties, the General Assembly passed resolutions regarding South Africa and Portugal which prohibited the Bank from giving financial assistance to these countries.[14] In the controversy that ensued, both the Bank and the U.N. raised various legal arguments about the scope of the Bank's undertakings under the Relationship Agreement and the limitations imposed by the Bank's Articles of Agreement.

The Bank argued that, by virtue of the Relationship Agreement, it was under no obligation to implement the U.N. General Assembly resolutions, not to mention those on which there was no prior consultation with

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12. Agreement, *supra* note 11, at art. VI (1). Articles 41 and 42 of the U. N. Charter cover the measures which the Security Council may take to maintain international peace and security. Article 48 of the Charter states that Security Council decisions should be "carried out by Members of the United Nations directly *and through their action in the appropriate international agencies of which they are members*" (emphasis added). *See* Kneller, *supra* note 3, at 421 for the view that, as far as obligations to the U. N. are concerned, members of the Bank are compelled to deviate from the Bank Charter "only to comply with the United Nations Security Council decisions for the maintenance of international peace and security."

13. Agreement, *supra* note 11, at art. IV. In addition, by a resolution dated September 13, 1951, of the Bank's Board of Governors, the Bank unilaterally undertook in the conduct of its activities to have due regard also for the recommendations of the General Assembly made pursuant to its "Uniting for Peace" resolution.

14. *See* 14 WHITEMAN, DIGEST OF INTERNATIONAL LAW 1004 (1970)

the Bank.[15] It further argued that it would be improper to accept the recommendations of the General Assembly in the cases involved because of the prohibition contained in article IV, section 10 of the Bank's Articles of Agreement which reads:

> The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.[16]

The Bank did recognize that on occasion it does take into consideration, and is influenced in its lending decisions by, the *economic effects* which stem from the political character of a member and from the censures and condemnations of that member by United Nations organs. (Emphasis added.) It emphatically stated that:

> by virtue of Article IV, Section 10, of its Articles of Agreement, the Bank, in exercising its judgment, must consider such economic effects together with all other relevant economic factors, in the light of the purposes of the Organization. What it is precluded from considering is the political character of a member as an independent criterion for decision.[17]

The controversy over the South Africa and Portugal resolutions ended with the Bank maintaining its position that it was prohibited under its Articles from interfering in the political affairs of its members. However, they would review the economic conditions and prospects of these two countries "to take account of the situation as it developed."[18] Since 1966, the Bank has not provided loans to South Africa on the grounds that it was no longer eligible to borrow under the Bank's "graduation policy" which is based on the economic positions of member countries. Further, the Bank suspended lending to Portugal for a long while on the grounds that the country had high reserves, could otherwise borrow on

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15. *See Memorandum of the Legal Department of the IBRD*, 22 U.N. GAOR Annex II, at 9, U.N. Doc. A/6825 (1967).

16. World Bank's Articles of Agreement, art. 4. sec. 10, 2 U.N.T.S. 134. *See also*, World Bank's Articles of Agreement, art. 3, sec. 5(b), 2 U.N.T.S. 134, which requires that the proceeds of Bank loans be used "without regard to political or other non-economic influences or considerations."

17. Memorandum, *supra* note 15, at 6. The U.N. Legal Counsel disagreed with the Bank's position and maintained that the first sentence of the said Article did not relate to criteria involving the international conduct of a State affecting its fundamental Charter obligations and that what it prohibited was interference in the internal political affairs of the Bank Member and discrimination against a Member because of the political character of its government. 21 U.N. GAOR 4-20, U.N. Doc. A/C.4/SR.1653 (1966). *See* Marmorstein, *supra* note 2, at 121-31. *But see*, Kneller, *supra* note 3, at 418-21.

18. For the relevant correspondence between the Secretary General of the U.N. and the President of the World Bank ending the controversy, see WHITEMAN, *supra* note 14, at 1008-09.

reasonable terms, and, during that time, lacked positive development policies.

The issue of human rights reemerged a decade later under a different situation arising in response to U.S. Public Law 95-118 which provided that:

> Sec. 701. (a) The United States Government, in connection with its voice and vote in the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Inter-American Development Bank, the African Development Fund, and the Asian Development Bank, shall advance the cause of human rights, including by seeking to channel assistant toward countries other than those whose governments engage in:
> (1) a consistent pattern of gross violations of internationally recognized human rights, such as torture or cruel, inhumane, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial to life, liberty, and the security of person; or
> (2) provide refuge to individuals committing acts of international terrorism by hijacking aircraft.
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> (f) The United States Executive Directors of the institutions listed in subsection (a) are authorized and instructed to oppose any loan, any extension of financial assistance, or any technical assistance to any country described in subsection (a) (1) or (2), unless such assistance is directed specifically to programs which serve the basic human needs of the citizens of such country.[19]

While the language of this legislation made it possible for the U.S. Executive Director to "abstain" and not necessarily "vote against"[20] loans to countries which engage in violations of human rights and did not provide rigid criteria for defining such countries, it raised an important legal question under the Bank's Articles of Agreement. Namely, can an Executive Director raise issues of a political nature in spite of the prohibition in both Article IV, Section 10, cited earlier, and Article V, Section 5(c) of

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19. Pub. L. No. 95-118, 91 Stat. 1069, 22 U.S.C., sec. 262(d) (1982). The language of this section quoted above was maintained in subsequent legislation except that reference to the African Development Bank was added by Pub. L. No. 97-35, and the word "consistent" was struck out by Pub. L. No. 98-181, sec. 1004(1). *See* U.S. SENATE/U.S. HOUSE OF REPRESENTATIVES, Legislation on Foreign Relations through 1987, pp. 775-77 (June 1987). U. S. legislation relating to human rights first affected bilateral aid under a 1975 amendment to the Foreign Assistance Act of 1961 which governs the activities of USAID. It then appeared in the 1976 Harken Amendment to the Inter-American Development Bank Acvt, Pub. L. No. 94-302, sec. 103(a)(1), 90 Stat. 592 (1976), and the African Development Fund Act, Pub. L. No. 94-302, sec. 211, 90 Stat. 595 (1976), where the U. S. Executive Director in the Boards of these institutions was instructed to vote against, rather than simply oppose, the loans, with the exception of loans that "directly benefit the needy people," rather than those made for "basic human needs," as in the 1977 Act.

20. The legislative history of Pub. L. No. 95-118 makes clear that the U.S. Executive Director can "oppose" by abstaining, voting "present", or taking any action other than voting "yes". *See* S. CONF. REP. No. 95-363, 95th Cong., 2nd Sess. 10 (1977).

the Bank's Articles? Section 5(c) provides:

> The President, officers, and staff of the Bank, in the discharge of their offices, owe their duty entirely to the Bank and to no other authority. Each member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties.

To answer these questions, the Bank had to address the issue whether the said Articles apply to Executive Directors who are officials of the Bank, but are appointed or elected by members of the Bank. The Bank's legal department took the view that the prohibition set forth in Article IV, Section 10 applied to the Executive Directors but recognized that there was no legal sanction available to challenge a vote by an Executive Director that was motivated by political considerations.

Recently, this author had the occasion to give a legal opinion on the relevance to the work of the Bank's Executive Directors of the provisions of the World Bank Articles of Agreement which prohibit political activities, after the human rights record of a certain Bank member was cited by some members of the Board in their comments on a large loan proposed for that member. My conclusions were as follows:

> 1. The Board of Executive Directors, as an organ of the Bank, is subject to the provision of Article IV, Section 10 of the Bank's Articles of Agreement and is therefore prohibited from interfering in the political affairs of any member of from being influenced in its decisions by the political character of the member concerned. Only economic considerations, which are weighed impartially, are relevant to the Board's decisions. However, political events which have a bearing on the economic conditions of a member or on the member's ability to implement a project or the Bank's ability to supervise the project may be taken into consideration by the Board.
> 2. An Executive Director is an official of the Bank who is appointed or elected by a member or members of the Bank and whose votes depend on the voting strength of the member or members who appointed or elected him, owes his duty both to the Bank and his "constituency." He may express the views of such a "constituency" and vote on its instructions, but he may not split his votes. However, he is not to act simply as an ambassador of the government or governments which appointed or elected him and is expected to exercise his individual judgment in the interest of the Bank and its members as a whole. Members of the Bank are under an obligation not to influence the Bank's President and staff in the discharge of their duties, and Executive Directors are under the duty not to act as the instrumentality of members to exert such prohibited influence.
> 3. The Chairman of the Board is entitled to rule out of order a political debate or statement which does not have a clear relevance to the economic considerations related to the subject matter under discussion.[21]

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21. *Prohibition of Political Activities Under the IBRD Articles of Agreement and Its*

While these conclusions clearly indicate that, as a general principle, the Bank, including its Executive Directors, may not take into account political considerations, they do suggest that there are political situations which have effects on the country's economy or on the feasibility of project implementation or monitoring which should therefore be taken into account. Human rights may, under this opinion, become a relevant issue but the degree of respect paid by a government to human rights cannot by itself be considered an appropriate basis for the Bank's decision to make loans to that government or for the voting of its Executive Directors. As Professor Reisman observed, "there is a limit to 'institutional elasticity', i.e., the extent to which institutions created and still used for other purposes can be 'stretched' in order to get them to perform human rights functions, especially when those functions are accomplished *at the expense* of their manifest functions."[22] Ignoring the limitations to this "institutional elasticity" could only be detrimental to the Bank and its members as a whole. This is especially true in matters where views differ sharply and political prejudice often colors the judgment of governments. While a loan to an authoritarian government may be seen as a form of support to that government, a development loan from the World Bank to a member country which is made to finance or facilitate investments and thereby improve the people's standards of living casts a different light. Arguably, if a loan is rejected soley on the basis of the authoritarian and suppressive character of the government involved, the result may only add another injury to the country's population who already the vicitms of actions of their own government and the inaction by the Bank. Further, such a decision would violate the explicit language of the Bank's Articles.

Sir Joseph Gold, the former General Counsel of the International Monetary Fund (IMF), recently commented as follows:

> Noneconomic considerations, particularly of a powerful moral character, may make decisions on some occasions appear, to some or even many members, to be applications of the maxim *dura lex sed lex* (hard law, but law). If some application of the law of the Fund is too hard to be acceptable to the membership, procedures for amendment exist under the Articles. The organs of the Fund, such as the Executive Board, are not authorized to adopt avowed amendments or decisions that have a similar though unavowed effect. The organs of the Fund, unlike to organs of some other international organizations, have not been granted the power to amend the treaty that governs the Fund. Members have reserved that power for themselves and have agreed on how it shall be exercised. They have required high majorities of their number and voting power to change the rules by which they have undertaken to be governed. The power may not be usurped

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Relevance to the Work of the Executive Directors, sec. M87-1409, at 8 (Dec. 23, 1987) (unpublished World Bank doc.).

22. Reisman, *Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs*, 72 IOWA L. REV. 391, 395 (1987).

by the organization created by members to administer the rules.[23]

The importance of maintaining the apolitical character of international financial institutions takes on an additional dimension in the case of those, such as the Bank, which rely in the funding of their operations on borrowing from private markets, as the latter obviously have a clear stake in the management on sound business principles of the funds they provide.[24] As the Bank increases its "policy-based" lending and policy-related conditions abound even in its specific project loans, it becomes all the more important to emphasize the apolitical character of the Bank. The Bank's dialogue with borrowing governments would obviously be greatly undermined if these governments were to doubt the Bank's objectivity or to see its conditionality as simply a reflection of certain political interests or views.

III. HUMAN RIGHTS PROMOTED BY THE BANK'S OPERATIONS

While the preceding remarks have shown that there are limits on the possible extent to which the World Bank can become involved with human rights, especially those of civil and political nature, the Bank certainly can plan, and has played, within the limits of its mandate, a very significant role in promoting various economic and social rights. This should become clear from the following discussion of human rights in which the Bank's role is particularly noteworthy.

A. Right to Development

The "right to development" was proclaimed by the U.N. General Assembly in a Declaration adopted on December 4, 1986.[25] Article 1, paragraph 1 of this Declaration states:

> The right to development is an unalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realized.

Article 2, paragraph 1 provides:

> The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

Article 4 reads:

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23. Sir Joseph Gold, *Political Considerations Are Prohibited by Articles of Agreement When the Fund Considers Requests for the Use of Resources*, INT'L MONETARY FUND SURV. 146, 148 (1983). Sir Joseph concluded by reminding his readers that "The swimmer who goes out too far may seem to be waving but is drowning. The Fund that swims out too far, even in a moral cause, will risk drowning. It will have lost the full confidence of its members. It will be less able to promote universal prosperity. That task is the Fund's moral cause."

24. *See* Kneller, *supra* note 3, at 366.

25. Res. No. 41/128, *reprinted in* 13 COMMONWEALTH L. BULL. 1013 (1987).

> 1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.
> 2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

The right to development as defined in this Declaration is one human right which the World Bank has been promoting throughout its history. In agriculture, irrigation, rural development, industry and various other types of Bank Group financing, the end beneficiaries are the individuals who should reap the benefits of the development brought about by Bank-financed projects. The magnitude of Bank Group assistance for development is reflected in the following. The World Bank has made loan commitments of about $146.5 billion up to January 31, 1988, while IDA had made commitments of about $46.6 billion up to that date.[26]

B. Freedom from Poverty

Some basic human rights such as the right to an adequate living standard, education, nutrition, health, and so forth are often denied by poverty. Thus, the right to the freedom from poverty has been universally recognized.

Article 11 of the International Covenant on Economic, Social, and Cultural Rights (hereinafter the International Covenant) addresses the universal right to adequate standard of living and of the right to freedom from hunger. Specifically, it provides that:

> 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.
> 2. The States parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes, which are needed.

Enunciation of similar rights, as well as of the rights to nutrition, and elimination of hunger, are contained also in the U.N. Declaration on Social Progress and Development of December 11, 1969. Also relevant is the Universal Declaration on the Eradication of Hunger and Malnutrition

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26. International Bank of Reconstruction and Development's Jan. 31, 1988 Statement of Loans, at 484; IDA's Jan. 31, 1988 Statement of Development Credits, at 314. The figures cover the total amount of loans and credits committed at the date of commitment and include two billion dollars lent by the Bank to the International Finance Corporation.

adopted on November 16, 1974 by the World Food Conference convened under General Assembly Resolution 3180 (XXVIII) of December 17, 1973, and endorsed by General Assembly Resolution 3348 (XXIX) of December 17, 1974.

In the first operative paragraph of the Universal Declaration, the Conference proclaimed the principle that:

> Every man, woman, and child has the unalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties. Society today already possesses sufficient resources, organizational ability, and technology and hence the competence to achieve this objective. Accordingly, the eradication of hunger is a common objective of all the countries of the international community, especially of the developed countries and others in a position to help.[27]

The Bank has recognized and focused on eradicating poverty in its lending operations. In the early years of the Bank's operations, it was assumed that if economic growth could be accelerated, poverty itself would be reduced. When it became clear in the 1960s that this was not necessarily the case, "expanding employment and raising the productivity of the poor" were added to the development agenda. The Bank set for itself the goal of raising the poorest groups within its borrowing member countries above the poverty line.[28] The Bank sought to achieve this in a number of ways. For example, it began to give strong emphasis to poverty alleviation in its lending program.[29] The Bank Group commitments to low-income-group countries, those with per capita annual incomes below $680, in 1979 increased from 37 percent of the total program before 1968 to 58 percent in the 1979-83 lending program. From 1979 through 1986, in terms of 1984 dollars, the low-income-group countries with per capita income below $790, received 54 percent of the Bank Group lending. The countries with per capita Gross National Product (GNP) of up to $400 received 93 percent of IDA lending in fiscal year 1986.[30] It should be noted that more than half of Bank Group lending has, since 1969, been to the low-income-group countries and that IDA lending is exclusively to this group, with countries with less than 4400 GNP receiving the bulk, nearly 95 percent, of IDA funds.[31]

Another way in which the Bank tackled poverty alleviation was by increasing its lending to sectors and subsectors which provided the most

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27. UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS, U.N. Pub., 205 U.N. Sales No. E.79.XIV. 6 (1980).

28. IBRD: FOCUS ON POVERTY 2 (World Bank Publ. rev. ed. 1983) [hereinafter FOCUS].

29. *Id.* at 4.

30. FOCUS ON POVERTY, A REVIEW OF BANK OPERATIONS IN FY86 26 (unpublished 1987) [hereinafter FOCUS - A REVIEW].

31. *See* Beckmann, *The World Bank and Poverty in the 1980s*, 23 FIN. & DEV. 26, 27 (1986).

direct benefit to the poor. Thus, it designed rural development projects and emphasized primary education, health, nutrition, small-scale industry, water supply and waste management, and urban development in its operations. This poverty-oriented, sectoral emphasis increased from five percent in 1968 to 30 percent in fiscal year 1986.[32]

The Bank consideres agriculture and rural development as central to poverty alleviation. Its lending to this sector reached more than thirteen billion dollars in fiscal years 1970 through 1981. Not only were the poorest countries the beneficiaries of such an increase, but there was greater emphasis on crops most likely to be grown or eaten by the poor.

The Bank also engaged in the more difficult task of tackling urban poverty. Over the last three decades, the urban population of developing countries has increased at the rate of about five percent per annum, nearly twice the rate of the overall population growth of these countries.[33] The population of cities such as Cairo, Calcutta, Mexico City, and Shanghai has surpassed ten million in each case. In 1972 a Bank study noted the growing shortages of shelter, sanitation, and drinking water affordable by the large urban population of developing countries. Under Bank Group lending, the upgrading of existing slums and squatter settlements, and the provision of serviced sites for low-income housing have directly benefited more than two million households through about fifty projects.

It cannot, of course, be maintained that all Bank projects have been equally successful in alleviating poverty. As one Bank study pointed out, in a minority of Bank projects, the landless may have become worse off. "In some instances, financing for combines, tractors, or modern rice mills has reduced employment, thereby adding to rural poverty."[34] Some other projects have "ignored the role of women in the production process and, by changing techniques and cropping patterns, adversely affected women's income-earning capacity."[35] In the case of urban projects, one study found significant problems, bottlenecks, and delays in the plot allocations.[36]

It is unfortunately obvious that the great mass of poverty is not likely to disappear in the near future. In fact, despite the national and international efforts, in some regions the trend is disquieting. For example, while incomes have suffered massive decline in the wake of international recession and debt crises in Latin America, unfavorable commodity prices, rapid population growth, and rising debt service payments have contributed to a greater deterioration in Africa. Average per capita real incomes in most of Latin America are no higher now than they were in

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32. *See* FOCUS, *supra* note 28, at 6; FOCUS - A REVIEW, *supra* note 30, at 28.

33. Jaycox, *The Bank and Urban Poverty*, in THE WORLD BANK AND THE WORLD'S POOREST 7 (1980).

34. FOCUS, *supra* note 28, at 13.

35. *Id.* at 15.

36. COOPER, DESIGNING THE SITE AND SERVICE PLOT ALLOCATION PROCESS: LESSONS FROM PROJECT EXPERIENCE 19 (World Bank publication 1982).

the mid-1970s. In much of Africa, they are back to the level of 1970. It is feared that due to slow growth, poverty may be increasing in some countries of the Middle East as well. In South Asia, the moderate rates of economic growth have not brought about any appreciable change to the poverty picture.

For some time it has been clear to the Bank that, for growth, the countries must make meaningful structural changes in their respective economic policies. It is also clear that past policies with respect to the poor cannot be continued. How the policy-based lending of the Bank is likely to affect the poor is an issue which the Bank is studying in each case with increasing care. All seven structural adjustment operations of fiscal year 1986, and thirteen out of seventeen sector adjustment operations of the same period, include estimates of the effect of adjustment policies on the poor. These operations are designed in such a way as to reduce the adverse effects on the poor as far as possible. The remaining four sector adjustment operations focused primarily on efficient restructuring, and no estimate of their poverty orientation was possible.[37]

Alleviation of poverty remains at the top of the Bank's development agenda and is now under scrutiny by a special task force in the institution. The Bank intends to work closely with the governments of its borrowing members on finding new and effective ways of involving NGOs, both international and local, as well as the private sector in the poverty eradication efforts.[38] The relevance of these efforts cannot be overemphasized, because the enjoyment of a number of basic rights cannot, in many parts of the world, be divorced from eradication of poverty. How to bring this about has become the predominant preoccupation today. Although the Bank has come a long way, it is obvious that the road is still long and narrow.

C. *Education*

Article 13 of the International Covenant provides that the states recognize the right of everyone to education. Paragraph 14 of the Proclamation of Teheran, adopted at the twenty-seventh plenary meeting of the U.N. International Conference on Human Rights on May 13, 1968, points out that:

> The existence of over seven hundred million illiterates throughout the world is an enormous obstacle to all efforts at realizing the aims and purposes of the Charter of the United Nations and the provisions of

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37. FOCUS - A REVIEW, *supra* note 30, at 37 *et seq.* *See also*, Development Committee, PROTECTING THE POOR DURING PERIODS OF ADJUSTMENT (1987), which refers to the establishment of new programs to benefit the poor during adjustment programs supported by the World Bank. For examples of adjustment programs designed to improve prospects for the poor, *see* Addison and Demery, *Alleviating Poverty under Structural Adjustment*, 24 FIN. & DEV. 41-43 (1987).

38. Address by Barber B. Conable, President of the World Bank and International Finance Corporation, to the Board of Governors, in Wash., D.C. (Sept. 29, 1987).

> the Universal Declaration of Human Rights. International action aimed at eradicating illiteracy from the face of the earth and promoting education at all levels requires urgent attention;[39]

Eradication of illiteracy was at the top of the agenda of many developing countries during the phase of their independence struggle and has remained so during the phase of post-independence economic and social development. In 1970, the General Assembly of the United Nations resolved: "As the ultimate purpose of development is to provide increasing opportunities to all people for a better life, it is essential. . .to expand and improve facilities for education, health, nutrition, housing, and social welfare, and to safeguard the environment."[40]

The Bank Group's involvement in education from 1962 to 1979 has resulted in the financing of 192 education projects in 81 countries. Nearly all subsectors of education are covered by Bank projects. It has lent money for primary, secondary, technical, agricultural, vocational, university, and basic education and rural skill training, adult training, paramedical training, etc.[41] Between 1963 and 1986, the Bank Group financed 284 projects costing more than $12.1 billion for education. This assistance helped create more than 2.6 million new student trainee places in approximately 21,000 educational institutions, which include 185 universities, 651 teacher training colleges, 2,903 secondary schools, and 18,000 primary schools.[42] A Bank study in 1983 noted that about five percent of Bank lending was for education. Furthermore, in order to provide the poor with skills to improve productivity, the Bank increased the proportion of lending for primary education to 33 percent of its total lending for education, compared with eight percent in 1969.[43] The Bank is also emphasizing the need for improvement in the quality of education.

As in the case of poverty, the magnitude of the problem of illiteracy is also staggering. The numbers of people still without education are overwhelming. Though some economists postulate that a 40 percent literacy rate is the threshold level for a developing country's economic take-off, only half the developing countries have attained a literacy rate of more than 40 percent. For a few African countries, the literacy rate is still within the range of seven to eight percent. The developing world currently has about 2.25 billion people of whom less than one-fifth, about 400 million, may be considered "literate."[44] Of those remaining, about 522 million are now enrolled in the formal education system. Two hundred

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39. HUMAN RIGHTS, *supra* note 8 at 18-19.

40. G.A. Res. 2626, 25 U.N. GAOR Supp. (No. 28) at 41, U.N. Doc. A/8028 (1971).

41. EDUCATION 127-140 (3d ed. 1980) (International Bank of Reconstruction and Development Sector Policy Paper).

42. THE QUALITY OF EDUCATION AND ECONOMIC DEVELOPMENT, A WORLD BANK SYMPOSIUM v (Heyneman & White ed. 1986).

43. FOCUS, *supra* note 28, at 22.

44. A. NOOR, EDUCATION AND BASIC HUMAN NEEDS 4-5 (International Bank of Reconstruction and Development Staff Working Paper No. 450, 1981).

and fifty million children have limited or no access to formal schooling and about 600 million adults have missed the opportunity of formal education. Females constitute about 60 percent of this group. "All this means that, for every person presently enrolled in school in the developing world, there are three people who are waiting in line for access to education and for whom new educational provision needs to be made."[45] The problem is getting worse as the numbers of people are growing faster than the resources to educate them. The Bank is calling attention to the need to spend more public funds on basic education in developing countries.

D. The Right to Health

Article 12 of the International Covenant recognizes the right of everyone to the enjoyment of the highest attainable standards of physical and mental health. Article 25 of the Universal Declaration of Human Rights provides, in paragraph 1, that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services. . .

In spite of the importance of sound health and nutrition in the development process, the Bank found that:

> despite their importance in broadly based programs for poverty alleviation, the areas of population, health, and nutrition still receive [in 1983] less than 1 percent of the Bank's total lending. Their slow growth in the 1970s suggests that a concentrated effort by the Bank will be required if they are not to be shunted aside in the 1980s because of resource constraints and other pressures on country budget allocations.[46]

After several years of informal activity, the Bank adopted a formal health policy in 1974. However, the Bank Group's health operations were limited to components of projects in other sectors. From 1975 through June 1978, 44 countries received technical and financial assistance through health components of projects in a variety of sectors at a total cost of $405 million.[47] The Bank also published a number of studies and established working arrangements with the World Health Organization and with other major bilateral donor agencies.

In spite of the increase in life expectancy in the developing countries in the last three decades, the level remains low compared to the developed countries. Thus, while for the latter it is about 70 years, for Africa it is about 47, for South Asia about 49, and For Latin America about 61 years.[48] The low level of life expectancy is attributable to the high rate of

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45. *Id.*

46. FOCUS, *supra* note 28, at 23.

47. HEALTH 5, 56 (1980) (International Bank of Reconstruction and Development Sector Policy Paper).

48. *Id.* at 10.

infant mortality. In Africa as a whole, the infant mortality rate is over one hundred deaths per thousand births. In Afghanistan this rate is estimated at 269, in Bangladesh at 140, and in India at 122. This may be compared to fifteen deaths per thousand for developed countries as a group, or eight such deaths for Sweden. It should be borne in mind that the mortality rates are much higher for rural areas and that infant mortality is "grossly unreported in most developing countries."[49] Health care facilities are also abysmally poor in developing countries. For example, there is one physician for every 70,000 people in Ethiopia, or 55,000 for Niger. There is only one hospital bed for nearly 6,600 people in Nepal and Afghanistan.[50] For the sake of comparison, it may be noted that in West Germany there is one hospital bed for twenty people, and one physician for 520 people.[51] While in countries such as the United States, the public and private health expenditures as a percentage of GNP amount to approximately 6.3 percent. In the mid-1970s in the Philippines they added up to only about 1.9 percent.[52] However, government expenditures on health in low-income countries seldom exceed two percent of GNP.[53]

The problem of health cannot be dissociated from adequate nutrition and other "basic needs" such as safe drinking water. The most widespread diseases in developing countries such as intestinal parasitic and infectious diarrheal diseases, as well as poliomyelitis, typhoid, and cholera, spread easily in areas without community water supply systems. There are still some countries where the safe water supply has not reached even five percent of the population.

Regarding nutrition, an earlier study of selected countries showed the following results. In 1974 in Bangladesh, 64 percent of the population consumed below 100 percent of the calories requirement. For the same year in India, 26 percent consumed below this requirement. In 1976, 44 percent of the population in Indonesia consumed below the required calorie intake. For Pakistan, the percentage was 50 in 1972. Only Sri Lanka, among South Asian states, showed a better record for 1971, when the calorie intake was more than what is required.[54] A recent Bank study examined the prevalence of energy-deficient diets in 87 developing countries using two energy standards. Namely, "below 90 percent of FAO/WHO requirement, which implies "not enough calories for an active working life" and "below 80 percent of FAO/WHO requirement", which is considered as not enough calories to prevent stunted growth and serious health risks. The study concluded that:

> If the energy standard adopted is merely enough calories to prevent

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49. *Id.* at 12.
50. *Id.* at 79.
51. *Id.* at 82.
52. *Id.* at 85.
53. *Id.* at 37.
54. NUTRITION AND FOOD NEEDS IN DEVELOPING COUNTRIES 36 (IBRD Staff Working Paper No. 328, 1979).

> stunted growth and serious health risks, an estimated 340 million people, or a sixth of the people in eighty-seven developing countries, had energy-deficient diets. If the standard is enough calories for an active working life, some 730 million people, or a third of the people in the same countries, lived with dietary deficits. Most of these people — four out of every five — were in low-income countries. This higher figure is the better guide to the harm that inadequate diets impose on development.[55]

Another study carried out by the Bank suggested that "there are powerful arguments for monitoring health and nutritional status in surveys of living standards, particularly if the studies are carried out in developing countries. . . Clearly, no assessment of the quality of life would be complete without including health and nutritional data."[56]

For the past few years, the Bank has started financing separate health projects and is placing more emphasis on primary health care and preventive measures. Although multisectoral nutrition projects have proved hard to administer, Bank projects and policy work, notably in Brazil, Colombia, and Indonesia, have raised the priority of nutrition in the national policies. The goal of universal access to basic health services by the year 2000 accepted by most governments, will require a major effort. The Bank is endeavoring to deliver its share. From fiscal years 1970 to 1979, the Bank Group lent approximately $340 million in the areas of population, health, and nutrition under twenty-one projects. From 1979 to the end of fiscal year 1987, the Bank Group lent an additional $1.2 billion under another 45 projects.

E. Women in Development

From around the beginning of this century, women's rights have been a concern of international conventions and conferences. Before the League of Nations was established, attempts were made to deal with conflict of laws relating to such matters as marriage and divorce and the suppression of traffic in women. An idea of the range of issues covered by international endeavors can be deduced from the following examples: equality of rights with men, prohibition of discrimination, protection of women and children in emergency and armed conflict, political rights of women, nationality of married women, minimum age for marriage, participation of women in public life at the national and local levels, property rights, inheritance, improvement of the status of the unmarried mother, prohibition against discrimination in education, women in rural areas, and women in development. For this article, the discussion will be confined to the integration of women in the development process, a subject of

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55. POVERTY AND HUNGER, ISSUES AND OPTIONS, FOR FOOD SECURITY IN DEVELOPING COUNTRIES 17 (1986) (World Bank Policy Study).

56. MARTORELL, NUTRITION AND HEALTH STATUS INDICATORS: SUGGESTIONS FOR SURVEYS OF THE STANDARD OF LIVING IN DEVELOPING COUNTRIES 3 (IBRD Working Paper No. 13, 1987).

growing concern in the Bank's work.

Article 8 of the Declaration of Right of Development states: "Effective measures should be undertaken to ensure that women have an active role in the development process." Article 10 of the International Covenant highlights the family as a unit and requires that "special protection should be accorded to mothers during a reasonable period before and after childbirth." Paragraph 15 of the Proclamation of Teheran also deals with women.

Women are disadvantaged by tradition in a great many societies. The discriminatory treatment often finds sanction often in custom or religious tenets, but also in legislation. They have to fight against heavy odds to be gainfully employed at non-discriminatory wages and to share in the benefits of the development process, be that for credit, housing, education, or other basic needs. At times, the bias against women is so strong in a country's culture, that those who fight against it are disdained by the majority of men and women alike.

In recent years, the Bank has been fairly active in developing programs and projects for women. The challenges to the Bank in this area are formidable. Studies on women's role are few and far between. Some statistics, while giving a reasonable composite picture of women's role in the labor force, appear to undercourt women's participatory role.[57] Some of them highlight the complexity of the problem. For example, one such study in the field of Agricultural Extension of three states in India points out that "women's role in the field of agriculture varies with caste, tribe, economic strata, influence of cities or urban situation, presence or absence of male head of families, age, marital status, authority and hierarchical pattern in the families, capabilities, etc."[58] In Kenya, where women play an important role in agriculture, they "rarely own land,"[59] which may prevent their access to credit. A study of Nepalese women also points out the dependence of women on land owned by males, due to the prevalent patrilineal system of inheritance.[60] Barber Conable, the President of the World Bank, summed it up in his first annual speech before the Board of Governors when he said,

> Women do two-thirds of the world's work. Their work produces 60 to 80 percent of Africa's food, 40 percent of Latin America's. Yet they earn only one-tenth of the world's income and own less than 1 percent of the world's property. They are among the poorest of the world

57. Berger and Horenstein, Integrating Concerns for Women into the World Bank's Indonesia Program, I.C.R.W. (Mar. 1987) (unpublished).

58. This statement was made by Dr. Krishna Mahapatra in an unpublished and undated draft entitled "Role of Women in Agricultural Extension Program: A Review."

59. Broad Assessment of Kenya's Development Objectives and Ways to Further those Objectives by Assisting Women (unpublished World Bank document, available at World Bank headquarters).

60. M. ACHARYA AND L. BENNETT, WOMEN AND THE SUBSISTENCE SECTOR: ECONOMIC PARTICIPATION IN NEPAL 44-46 (IBRD Sector Working Paper No. 526, 1983).

poor.[61]

The Bank Group's approach to women in development is still in the formative phase. A recent example is the Agricultural Development Project in Imo State of Nigeria where the Bank is promoting a "package" which involves cassava, late maize, and cowpeas which are overwhelmingly "women's crops," and efforts are underway for a "dramatic increase" in extension contact with female farmers.[62] The Second Borgou Rural Development Project in Benin also includes assistance to women's groups for food crops and processing. The Agricultural Extension Project in Togo will study the role and contribution of women in agriculture and rural development. The Bank has been working to develop practical ways of reaching women farmers in other countries. The development of women's access to credit and of entrepreneurship among them are also a major focus of the Bank. In the case of Bangladesh, consideration has been given to the training of women, strengthening of research-extension services for rural women's cooperatives, supporting rural women's group participation in small business ventures, development of experimental projects for promoting women's cooperatives, for savings mobilization and group loans for small businesses, establishing a banking facility offering daily and weekly loans along the lines of the People's Bank in Sri Lanka, and the promotion of female education opportunities.[63]

Education poses a special problem in respect to women. In the rural areas of Pakistan, only six percent of women are literate.[64] The female literacy rate in Bangladesh, at about thirteen percent, is around half that of males.[65] In Papua, New Guinea, enrollment of girls has lagged behind that of boys at a rate of about 2 to 3 because girls are normally kept at home to care for younger children and perform other tasks. Many parents in rural areas of the highland provinces do not wish their daughters to be educated because of perceived negative effects on the matrimonial eligibility of educated girls.[66] Thus, Bank projects, such as a recent one in Papua New Guinea, thus are aimed at improving the enrollment ratios for girls.[67]

At times, the Bank has specified that a certain percentage of benefi-

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61. Address, *supra* note 38, (Sept. 30, 1986).

62. R. L. Blumberg, Through the "Window of Opportunity": Enhancing the World Bank's Agricultural Development Project in Imo State, Nigeria, by Enhancing Extension and Incentives for Women Farmers (Oct. 1986) (unpublished World Bank draft document, available at World Bank headquarters).

63. J. Jiggins, Outline of a Programme to Strengthen Women's Economic Contribution (Mar. 1987) (unpublished World Bank document, available at World Bank headquarters).

64. B. Herz, Women in Development (May 11-12, 1987) (unpublished World Bank document, available at World Bank headquarters).

65. Promoting Economic Opportunities for Women (unpublished and undated World Bank document, available at World Bank headquarters).

66. P. R. on a Proposed Loan and Credit to Independent State of Papua, New Guinea for a Primary Education Project (Dec. 1, 1980).

67. *Id.* at 18.

ciaries of the projects financed by it must be women.[68] Special emphasis is also being placed on the monitoring and evaluation of the impact of projects on women.[69]

In connection with the subject of women, mention should be made of the recent Safe Motherhood Initiative. In February 1987, the Government of Kenya hosted an international conference on safe motherhood which was cosponsored by the WHO, the U.N. Fund for Population Activities, and the World Bank. It has been estimated that about half a million women die from pregnancy-related causes every year. Almost 300,000 of these deaths occur in South and West Asia, 150,000 in Africa, 34,000 in Latin America, and 12,000 in East Africa developing countries as against 6,000 in all developed countries. The magnitude of this tragedy is simply staggering if one bears in mind that women who die in the childbearing period leave, on average, two or more children.[70] The Safe Motherhood Study carried out by the Bank firmly holds that most maternal mortality can be prevented by a "system" approach to health care in conjunction with broader development measures to improve the health status, education, and incomes of women.

The Bank's firm commitment to women in development has been enhanced under its present management. There is little doubt that the Bank's increased emphasis on this subject is going to strengthen the effectiveness of the Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, adopted by ILO on June 29, 1951, as well as further the general objectives and some specific provisions of the U.N. General Assembly Declaration on the Elimination of Discrimination against Women of November 7, 1967.

F. Refugees

Another major human problem which falls within the activities relation to human rights is that of the refugees which shows no signs of abatement. In 1985, the total number of refugees was estimated at 10,069,700.[71] Of this number, more than nine million refugees have sought asylum from thirteen developing countries. The highest concentrations of refugees is generally in the poorer countries. At present, Pakistan has 2.8 million, the Sudan over one million, and Somalia over half a million. While some refugee problems have been solved over time, such as those of the refugees in India from the former East Pakistan, others, like those of Palestinian refugees, have defied solutions for decades. The tragic human suffering of the refugees and the enormous economic burden that the

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68. *See, e.g.*, Uganda: Southwest Regional Agricultural Rehabilitation Project (negotiated but not signed).

69. *See, e.g.*, Malawi: Smallholder Agricultural Credit Project, Credit (No. 1851) (signed Dec. 22, 1987).

70. HERZ AND MEASHAM, THE SAFE MOTHERHOOD INITIATIVE, PROPOSALS FOR ACTION 3 (IBRD Discussion Paper No. 9, 1987).

71. THE WORLD ALMANAC 634, 635 (1987).

countries of asylum have to carry scarcely need emphasizing. By June 1984, the UNHCR had, through its programs, assisted Pakistan to the extent of about $79 million, Somalia $39 million, Thailand $33 million, and Sudan $30 million.[72]

The international law relating to refugees is primarily contained in the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees.[73] Article 17, paragraph 1 of the 1951 Convention states that: "The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment."

As an example of the Bank's role in alleviating the problems of refugees, the Bank assisted Pakistan in providing work opportunities to the refugees and the local population under a project identified in 1982. To implement this project, the Bank and UNHCR entered into a memorandum of understanding for further cooperation; the Bank appraised an "Income-Generating Project in Refugee Areas" for Pakistan, prepared all documentation required for the negotiations, and negotiated the agreement on behalf of the UNHCR. All funds provided by the donors for the project were transferred to the Bank.[74] UNHCR entrusted the administration of these funds, as well as the supervision of the project, to the Bank. An agreement for a second project, along similar lines, was recently concluded between the UNHCR and Pakistan.

G. Environment

The close relationship between the environment, human rights, and development has been recognized since the early 1970s. However, the 1972 U. N. Conference on the Human Environment focused attention on the subject and emphasized the right of all human beings to a healthy and productive environment, including the right to adequate food, sound housing, and safe water. The 1972 Conference adopted the Declaration on the Human Environment and an "Action Plan" for the protection and enhancement of the environment. It has been noted that,

> This Declaration may be regarded as doing for the protection of the environment of the earth what the Universal Declaration of Human Rights of 1948 accomplished for the protection of human rights and fundamental freedoms, that is to say it was essentially a manifesto, expressed in the form of an ethical code, intended to govern and influence future action and programmes, both at the national and interna-

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72. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. J. INT'L. L. 532, 551 (1986).

73. 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (1954); 1967 Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 (1967).

74. Memorandum of Understanding between the International Bank for Reconstruction and Development and the Office of the United Nations High Commissioner for Refugees (Oct. 1982) (unpublished World Bank doc.).

tional level.[75]

Indeed, since the Conference, a spate of international agreements have been entered into. Legislation and other forms of law establishing governmental institutions for the purpose of the protection, management, and enhancement of the environment have also been passed in many countries.[76]

Conscious of the environmental dimensions of Bank-financed projects, the Bank created the position of Environmental Adviser in 1970. More importantly, as is recognized by the Brundtland Commission,[77] the Bank was the first multilateral development institution to issue guidelines to its staff for dealing with environmental issues raised in the formulation, appraisal, and execution of projects. These guidelines were later expanded into a booklet[78] which was made available to economic development agencies, governments, universities, and other public and private institutions. In addition, the Bank was in the forefront of the adoption of a declaration of environmental policies and procedures relating to economic development which was aslo adopted by almost all the multilateral development agencies[79], the EEC, the Organization of American States, the United Nations Development Program and the United Nations Environment Program. The most important part of the declaration, paragraph 4, states that the institutions should support project proposals that are specially designed to protect, rehabilitate, manage, or otherwise enhance the human environment, the quality of life, and resources thereto related.

There are various tenets related to human rights which underlie the Bank's guidelines and its operational policies which have evolved over several years. The most relevant one for this purpose is that the Bank endeavors not to finance projects which cause severe or irreversible environmental or natural resource deterioration or unduly compromise public health and safety or that displace people or seriously disadvantage certain vulnerable groups without undertaking mitigatory measures acceptable to the Bank.[80] Thus, in all its projects, whether in the agriculture, energy, industry, urban development, and transportation sectors, the Bank assesses the possible impact of the project on the environment, including the public health and welfare so as to mitigate its effects.

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75. J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 386 (9th ed. 1984).

76. *Register of International Treaties and other Agreements in the Field of the Environment*, UNDP/GC/Information/11/ Rev. 1. (Nairobi) (1985). *See also*, UNEP, DIRECTORY OF PRINCIPAL GOVERNMENTAL BODIES DEALING WITH THE ENVIRONMENT (1985).

77. Our Common Future, 337-338 (report by the Brundtland Commission) (1987).

78. Environmental, Health, and Human Ecological Considerations in Economic Projects (World Bank publication, 1972).

79. African Development Bank, Arab Bank for Economic Development in Africa, Asian Development Bank, Caribbean Development Bank, and Inter-American Development Bank.

80. *See* Environment and Development, at 32-35 (World Bank Publication, Nov. 1979).

One or two projects are illustrative of the Bank's role. In the Environmental Control Project in Singapore, the Bank financed the construction of an incinerator for domestic and commercial waste. Specific safeguards were included in the project design to ensure that emissions from the plant complied with the Clean Air Act of Singapore. In addition, the design included noise abatement features. More importantly, adequate monitoring procedures were established to ensure that the operation of the facility would continue to be safe. In the Valesul Aluminium Project in Brazil involved the construction of an aluminium smelter. In that project, the main sources of pollution were identified the facilities to be constructed were designed to incorporate pollution abatement equipment in order to avoid a potentially adverse effect on the highly populated areas near the proposed plant. The pollution abatement feature was included in the project even though Brazil did not have detailed pollution control regulations. In this particular case, the Bank was instrumental in stalling start-up operations when the pollution control equipment failed. The project went into operation only after the problem had been remedied. In short, the Bank takes seriously the possible effects of the projects it finances on the human environment consistent with its operational policies and paragraph 4 of the above mentioned declaration of environmental policies and procedures. It should be noted in these projects, as in many others financed by the Bank, that the obligations of the borrower in this connection are set forth in covenants in the loan or credit agreement entered into between the Bank and the borrower. These covenants often take the form of specific undertakings requiring completion of specific tasks in addition to the general covenants requiring the project to be carried out with due regard to ecological and environmental factors.

A Bank study reviewing a total of 1,342 loans and credits for the period July 1, 1971, to June 30, 1978, shows that: (i) in 845 of such loans or credits, 63 percent revealed no apparent or potential environmental problem; (ii) in 22 cases, representing 1.6 percent of all loans and credits, some other agency such as U.N. Development Program (UNDP) or WHO had already taken appropriate action in respect to needed safeguards; (iii) in 365 projects, 27 percent of the total, the environmental problems identified were dealt with by Bank staff; and (iv) 110 projects had problems apparently sufficiently serious to require special studies by consultants and incorporation of safeguard measures as a condition of lending.[81]

Under its new organization, the Bank has established a full-fledged Environment Department as well as environmental units in each of its regional offices to assess the environmental impact of each project proposed to be financed by the Bank and to monitor each project's progress to determine the accuracy of Bank forecasts of the environmental impact. The Bank is also engaged in a review of the legal and institutional framework for environment and natural resource management in several coun-

81. *Id.* at 9-10, *reprinted in* World Bank Publication Jan. 1986.

tries with a view to advising on measures that would assist in the implementation of effective governmental programs and projects.

H. Involuntary Resettlement

A problem interrelated with environmental issues and human rights is the involuntary settlement of people that some development projects entail. Involuntary resettlement causes profound social disruption to the individuals concerned. It can also cause serious damage to the environment.

Recently, a good deal of public attention has been accorded to this particular aspect of some Bank-financed projects. Resettlement raises a host of sensitive issues. The right of a State to exploit its natural resources and its right take private property for public purposes, are universally recognized. It is also generally accepted that a State has an obligation to provide, at a minimum, opportunities that would allow for the welfare of its people. Initially, it was understood that the doctrine of "eminent domain" as developed and applied within a State and the provision of compensation for the lost assets could take care of the problem of the affected population. But compensation is by definition only awarded to owners of the lost assets, while the vast majority of the affected population, in both rural and urban areas, is composed of possessors, laborers, or squatters who may not be entitled to any compensation. In addition, compensation, at best, will reflect the market value of the lost assets which may well be below the replacement cost. Moreover, compensation cannot, and is not intended to, fully compensate for the emotional and cultural loss which occurs when people are cut off from their traditional habitat. Nowhere is this more acute than in the case of indigenous classes or the tribal people in whose case there is danger of the extinction of their entire lifestyle. Thus, compensation may not by itself constitute an adequate means to reestablish the standard of living of the affected population and provide for their welfare.

Conscious that balanced development cannot be achieved through the hardship and suffering of a sector of society, the Bank in the early 1980s adopted a policy aimed at avoiding the involuntary resettlement of people in Bank-assisted projects. In cases where resettlement is unavoidable, the objectives of the policy are to lessen, as far as possible, the hardship and stress imposed by forced resettlement and to enable the affected people to acquire, as quickly as possible, living standards that at least match those enjoyed before resettlement. The policy stresses the importance of well prepared resettlement plans, including careful preparatory work with the involuntary settlers, the host community, and their respective leaders prior to the move.[82] The policy of the Bank is thus that compensation should go beyond cash payments for lost assets, requiring, in

82. *See* Escudero, *Involuntary Resettlement in Bank Assisted Projects: An Introduction to Legal Issues*, WORLD BANK, LEGAL DEPARTMENT (1988).

addition, measures to permit the actual restoration or improvement of the standards of living of the settlers.

The policy sets forth certain procedures to be followed in Bank-assisted projects causing involuntary resettlement. These procedures require that, as early as the project identification stage, the Bank must discuss with the borrower its policies, plans, or preliminary ideas for the resettlement sites, and the institutional and legal arrangements for planning and executing the resettlement. It is further required that planning and financing of the resettlement should be an integral part of the project that the borrower should agree with the Bank to carry out the resettlement in accordance with plans consistent with the Bank's policy, and that Bank supervision missions should pay careful attention to the implementation of such plans. Since the adoption of its involuntary resettlement policy, the Bank Group has financed nearly fifty projects that involve involuntary resettlement of significant numbers of people.[83] Depending on the magnitude of the resettlement involved and because of the importance that the Bank attaches to the resettlement of the oustees, it has in recent years proposed specific projects whose major component is resettlement.[84]

While the task of reconstructing the livelihood of people living within the conventional socioeconomic sectors of society is complex and difficult, the challenge is even greater when dealing with isolated or semi-isolated tribal communities whose way of life differs markedly from that of the wider society. Although "it is not the Bank's policy to prevent the development of areas presently occupied by tribal people,"[85] the Bank adopted a policy in 1982 requiring it to refrain from assisting development projects that knowingly involve encroachment on traditional territories being used or occupied by tribal people, unless adequate safeguards are provided.[86] Under this policy, the Bank will only assist projects when the borrower or relevant government agency supports and can implement measures that will effectively safeguard the well-being of tribal people without either perpetuating isolation from the national society or promot-

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83. *Id.*

84. For example, the Itaparica Resettlement and Irrigation Project in Brazil, the Mahaweli Ganga Development Projects in Sri Lanka, the Third Dhaka Water Supply Project in Bangladesh, and the Narmada Sardar Sarovar Dam and Power Project in India.

85. R. Goodland, *Tribal Peoples and Economic Development*, (World Bank publication 1982).

86. In dealing with the subject of tribal societies, one encounters a somewhat difficult task in defining them. The Bank's policy defines tribal people as ethnic groups typically with stable, low-energy, sustained-yield economic systems. In an attempt to make the definition more precise, the policy indicates that hunter-gatherers, shifting or semipermanent farmers, herders, or fisherman are examples of tribal people as long as they exhibit certain social, cultural, and economic characteristics representative of unacculturated ethnic minorities. For somewhat broader definitions of tribal and indigenous people, see ILO Convention No. 107 *entered into force* June 2, 1959, International Labour Conventions and Recommendations, 1919-1982 at 858 (1982); *see also* J. Martinez de Cabo, *Study of the Problem of Discrimination Against Indigenous Populations* (U.N. Publication, reissued 1986).

ing forced, accelerated acculturation unsuited to the future well-being of the affected tribal people.

It is no exaggeration to say that the Bank's policies are beginning to have an impact on the policy of its borrowers in respect of involuntary resettlement and tribal people. Even countries whose constitutions take a narrower view of the duty to compensate (e.g., India) have agreed in the context of Bank loans to measures going well beyond their local laws and have enhanced existing policies or adopted new ones along the lines of the Bank's policies. In other cases, Bank-assisted projects have served to promote the enforcement of existing domestic law regarding the treatment of tribal people (e.g., In Brazil and India).

IV. OTHER HUMAN RIGHTS

Thus far this paper has addressed a few basic human rights essentially of economic and social content. The enjoyment of civil and political rights and the accomplishment of economic development both constitute necessary elements for human progress. In this respect, reference may be made to the Proclamation of Teheran of May 13, 1968, which states that:

> The widening gap between the economically developed and developing countries impedes the realization of human rights in the international community. The failure of the Development Decade to reach its modest objectives makes it all the more imperative for every nation, according to its capacities, to make the maximum possible effort to close this gap;[87]

The Proclamation goes on to say:

> Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social, and cultural rights, is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development;[88]

By joining hands with developing countries and other international agencies in the alleviation of poverty, in combating disease, malnutrition, illiteracy, and fighting for the preservation of the environment, in seeking an enhanced role for women in development, and by being partners with these countries in the gigantic task of economic development, the Bank is not only promoting economic and social human rights, but is no doubt playing a catalytic role in creating conditions in which all basic right can develop and flourish. While the Bank is prohibited from being influenced by political considerations, its staff increasingly realize that human needs are not limited to the material "basic needs" often emphasized on the 1970s. Civil rights are also basic to human development and happiness. In

87. Human Rights, *supra* note 39, at 19, para. 12.
88. *Id.* at para. 13.

the view of this author, and of an increasing number of others, no balanced development can be achieved without the realization of a minimum degree of all human rights, material or otherwise, in an environment that allows each people to preserve their culture while continuously improving their living standards.

This is not to suggest in any way that the World Bank should fail to carry out its mandate and deprive the peoples of developing countries of opportunities to achieve a greater measure of economic development simply on the basis of the harsh treatment which their own governments might be inflicting on them. It suggests, however, that the Bank should be concerned with the broad effect of its loans on the welfare of the beneficiary individuals. Human rights violations may in specific cases also have broader implications related to the country's stability and prospective creditworthiness or to its ability to carry out Bank-financed projects, or to the Bank's ability to supervise them, which obviously are factors that the Bank must take into account to the extent they prove relevant in the circumstances of a specific case. The Bank's record in meeting the requirements of economic and social entitlements of the populations of its developing member countries is impressive, in spite of some possible adverse effects on the poor in certain cases. Its efforts regarding the alleviation of poverty and the protection of the poor segments from the adverse effects of adjustment policies are being reinforced at present and should gain greater importance in the years to come.

International Development Agencies, Human Rights and Humane Development Projects*

JAMES C.N. PAUL**

There is growing recognition that International Development Agencies (IDAs), both multilateral and bilateral, must promote as well as protect "universal" human rights when (in collaboration with governments) they engage in "development projects"[1] which affect the basic interests of

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* In the preparation of the paper, I owe a very large, continuing debt to my colleague Dr. Clarence Diaz who is President of the ICLD. Kathryn Harlow and Christine Brautigan, two young lawyers who participated in the 1986 Columbia University seminar on "Law, Development and Human Rights in Africa," rendered very valuable assistance in examining various issues concerned with earlier studies of the World Bank's human rights obligations.

This paper also grows out of my association with the ICLD, notably a series of workshops and meetings which focused on the diverse impacts of various kinds of international "development projects" on the rights of people peculiarly affected and often "victimized" by these projects.

For a discussion of NGO strategies to help project-affected people use human rights law to "fight back" and to promote people centered development see C. Dias and J. Paul, *Developing Legal Strategies to Help Combat Rural Impoverishment: Using Human Rights and Legal Resources*, in THE INTERNATIONAL CONTEXT OF RURAL POVERTY IN THE THIRD WORLD: ISSUES FOR RESEARCH AND ACTION BY GRASSROOTS ORGANIZATIONS AND LEGAL ACTIVISTS, 231-67 (D. Dembo ed.)

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1. The term "development project" is probably a word of art in development circles, but it is difficult to define. The International Bank of Reconstruction and Development (i.e. World Bank) was established to make loans "for the purpose of specific projects of reconstruction and development." *See* Article III section 4 (vii) of the Articles of the International Bank for Reconstruction and Development (The World Bank's Charter), 60 Stat. 1440 (1945). T.I.A.S. 1502; 2 U.N.T.S. 134. *See also* W.C. BAUM AND S.M. TOLBERT, INVESTING IN DEVELOPMENT: LESSONS OF WORLD BANK EXPERIENCE 6-10 (1985). It appears that a project is an undertaking which is planned carefully and has specific objectives and a specific life span. Projects entail specific sets and sequences of activities and are often planned to benefit particular groups of people in certain geographic areas, or other identifiable groups in specific ways.

A project may be directed towards development of infrastructure, services, production and marketing, (e.g., of new crops) or training. World Bank projects are initiated, planned, negotiated, implemented, monitored, evaluated, and audited in accordance with an elaborate set of procedures built around the concept of a "project cycle," which consumes years, often at least ten.

It is now recognized, more than in earlier decades, that many development projects: (i) entail deliberate external interventions into the physical and social environments and lives and affairs of particular communities and groups which are politically vulnerable; (ii) impact quite differently on particular groups and often adversely in social and economic terms and (iii) often create or exacerbate serious environmental problems which in turn adversely af-

particular people and groups. Indeed, policy statements recently promulgated by a significant group of IDAs clearly set forth the object of advancing human rights as part of their mission.[2] The time has come to gear performance to these aspirations.

The duty to protect and promote rights must now be seen as a mandatory obligation imposed by law; it cannot be ignored. It should also be assumed by IDAs as a matter of sound policy and based on both lessons of experience and a general international consensus regarding both

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fect people. The World Bank has recently developed both a "social" and an "environmental" analysis as a required component of project planning and design. *See* BAUM AND TOLBERT, *supra* chapters 22, 24. Recognition of an obligation to make these kinds of analyses are large steps towards a recognition that all of the processes involved in a project cycle must be put under a regime of law designed to assure the protection and full exercise of human rights by project-affected people.

2. Beginning in the early 1970s, some western governments announced their intention to impose human rights standards on their international development programs. In 1975, for example the Ministry of Development Cooperation of the Netherlands declared that it would apply human rights standards to its foreign aid policies. In 1977, its Minister wrote:

> Development aid must set in motion processes through which the poor and the oppressed can achieve freedom and the right to a say in their own affairs. . . . Development aid should be concerned with the rights of peoples and individuals, and not with the interests of states. We must try to use channels which reach the people directly." *See* Jan P. Pronk, *Human Rights and Development Aid*, in REVIEW OF INTERNATIONAL COMMISSION OF JURISTS, 36-37 June 1977.

See K. Tomasevski, "Human Rights Standards in Development Aid: Donor Policies" (prepared for the ICLD - University of Windsor Seminar on "International Development Agencies, Human Rights, and Humane Development," June 1988).

In 1975, the U.S. Congress enacted the Harkin Amendment to the Development Assistance Act which prohibits "assistance" to any "government" which "engages in a consistent pattern of gross violations of internationally recognized human rights." *See* Pub. Law 94-161, Dec. 20, 1975, 89 Stat. 860 (codified as amended 22 U.S.C. § 2151N(a)). In 1977 this prescription was extended to the IDRB and other international banks supported, in part, by U.S. contributions. Pub. Law 95-118 (1977), 91 Stat. 1067, section 701. U.S. directors were instructed to "advance the cause of human rights" and to oppose loans to governments which engaged in a "pattern of gross violations."

In subsequent enactments, Congress has appropriated foreign assistance funds to "promote increased adherence to civil and political rights as set forth in the Universal Declaration of Human Rights. . ." *See* Pub. L. 97-113 (1981) (Title III, § 306), 95 Stat. 1533, (codified as 22 U.S.C. 2151N(e)). *See also, e.g.*, 22 U.S.C. 2151K (a) and (b) promoting participation of women in development processes) and 22 U.S.C. 2304(a)(1) and (2) (deals with security assistance and also contains declaration that "a principal goal" of "foreign policy" is to "promote the increased observance of internationally recognized human rights).

More recently, donor governments (Canada, Netherlands, and the Scandinavian countries have made clear their intentions to promote human rights through their development programs. *See generally*, Tomasevski, *supra* and Human Rights in Developing Countries 1987/1988: Yearbook on Human Rights in Countries Receiving Nordic Aid 11-21 (1988) A notable statement is the Norwegian White Paper No. 36 of 1984/1985. *See also* H. Kjekshus, "Development Aid and Human Rights: Some Observations by the Norwegian Ministry of Development Cooperation." In Canada, the celebrated "Winegard Report," For Whose Benefit? Report of the Standing Committee on External Affairs and International Trade on Canada's Official Development Assistance Policies and Programs, May 1987, has explicitly urged CIDA (Canadian International Development Agency) to make human rights and poverty-centered development programs priorities.

the ends and means of "development." This paper explores: the legal bases for the obligation; relationships between particular kinds of development projects and particular rights, the kinds of harms caused when these rights are ignored, strategies which IDAs can adopt to meet their duties to protect and promote them and, finally, the question whether assumption of these obligations by IDAs, would constitute an illegal "political interference" in the affairs of countries which they seek to assist. These issues are just beginning to receive the attention they deserve. The analyses presented here are meant to be suggestive to help stimulate the kinds of more carefully focused, action-oriented debates and studies which the subject clearly warrants in view of its great importance to so many people in the Third World.

INTRODUCTION: A MAP OF THE PAPER

Part I discusses the legal context. The institutions and processes of the United Nations (U.N.) system have now been used to declare the existence of a broad range of "inalienable" and "universal" human rights which are the common heritage of all people. Many of these rights are often affected by development projects, which, by design, often impact adversely on particular communities and groups of people, notably those most vulnerable. Because these projects usually entail deliberate interventions into the affairs and welfare of communities, they regularly implicate rights of participation; they often affect rights to food, health, or education and the rights of self-provisioning smallholders to security in their lands and, thus, their rights to livelihood. Many projects also affect rights of equality now guaranteed to women. Development projects affect workplace rights of agrarian laborers of all ages and both genders. All of these rights can be protected and promoted by those who design, manage, and monitor development projects. When they are ignored, then people are wronged, often seriously.

International law now holds that the promotion of "universal" human rights must be treated as *an essential means* as well as essential end of development activities. Thus, these rights not only express values which must inform the concept of development, they mandate the imposition of duties on officials who manage the development. These duties require the incorporation of new processes into the law governing development projects which enable participation and empower affected people to assert their rights and provide means of redress for people harmed by official failures to protect rights. These processes impose accountability on those who ignore this responsibility. Unless IDAs operate within this framework of law, they incur the patent risks of inflicting the very wrongs which human rights law seeks to prevent. Indeed, as international agencies, IDAs should be peculiarly obliged to promote the humanitarian goals of "government" now mandated by international law.

Part II discusses empirical and policy bases to support the legal propositions just set forth. Abundant experience documented by IDAs teaches that when basic rights are ignored, when they are not incorpo-

rated as goals, standards of accountability, and processes of a project, poor people are sometimes seriously harmed. The harms inflicted may include displacement and landlessness, new forms of indebtedness and impoverishment, disease and hunger, discrimination, and continuing political exclusion. Failure to identify potential victims threatened with these wrongs, and failure to protect their rights at every stage of a project cycle, not only increases risks that these harms will occur and that the "social costs" and other undesired economic outcomes of the project will be seriously underestimated, it also increases the risk that, when these harms do occur, the victims of them will receive inadequate relief. Failure to take rights seriously at every stage of a project cycle, especially rights of participation, has also meant that the planning, administration, and evaluation of countless people and poverty-centered projects have been flawed. Notorious examples of this neglect are revealed in studies portraying the adverse impact of agricultural projects on women and other vulnerable groups. Indeed, it is now recognized by many IDA "experts" that effective, self-reliant participation is essential to the design as well as the implementation, monitoring, and regulation of all development projects which affect particular groups of people in particular ways. But "participation" has remained an elusive, amorphous goal, because development planners tend to treat it as something desired, but discretionary, rather than an aggregate of rights which impose duties. Once these rights are understood, the tasks of IDAs to secure participation will become more apparent, less debatable.

Part III examines ways by which IDA can meet their legal obligations. A number of approaches are discussed: (1) developing research, education, and a human rights orientation of staff (a very important consideration in view of entrenched patterns of behavior and the common "mind set" of "professional" practitioners of "development"); (2) developing a clear body of law (e.g., via legislation, regulations, and operations manuals) which imposes duties on those responsible for each phase of a project cycle to discover all categories of people directly affected by a proposed project and to crate standards, processes, and institutions which assure their informed, self-reliant participation and protection of their basic rights; (3) developing particular bodies of law for each project (e.g., by appropriate provisions in loan agreements) to secure the above objectives; (4) encouraging project-affected people to form self-reliant, self-managed organizations and encouraging other NGOs to assist these processes and, where necessary, (5) helping these groups to develop their own "legal resources" (i.e., knowledge of relevant law and group capacity to use it) to enable them to identify and assert rights necessary to promote and protect their shared interests; (6) developing legal standards through both international instruments and agency law which prohibit development activities that negligently expose people to foreseeable physical and economic harm; (7) developing rules of accountability and sanctions to enforce these duties, and (8) encouraging NGOs (both international and national) to monitor development activities and help protect

the interests of those affected by the project.

These requirements are analogous to those now being undertaken by many IDAs to make sure that their projects protect environments and promote "sustainable" development. Indeed, if development efforts are to be "sustainable" in both human and environmental terms, then they must be put under a new "rule of law" which respects the rights of people as well as the laws of nature.

Part IV addresses the question whether the assumption of any of these human rights obligations by IDAs would constitute an illegal political interference in the affairs of sovereign states. The answer is "no," in view of the development of international human rights law, the present international understanding of the concept and central purposes of "development," and in view of the proactive roles which IDAs have long played in determining policies governing the design and implementation of the development projects they fund. Those who "do development" through international collaboration must now operate under a regime of law which empowers project-affected people to exercise and protect rights deemed basic by the overwhelming consensus of the world's community of states.

This paper focuses on "development projects," *not* on other kinds of lending, nor on problems raised by IDA roles in the "restructuring" of and aid to the economies of debt and recession-plagued countries. Neither does it focus on the difficult question of how to determine whether and when the record of human rights abuses of some governments (e.g., Haiti) has become so egregious that all international aid should be curtailed, or the related problems of how to structure development projects in countries ruled by authoritarian regimes which lack both popular legitimacy and a credible commitment to respect rights. These and other problems are obviously important, but they raise different and more difficult legal and policy issues.[3]

Despite present concern over the debt crises afflicting many Third World countries, shifts in World Bank lending priorities, and the need to reform economic policies governing north-south relations, development

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3. Some of the problems involved in "adjustment," "restructuring," and in developing human rights standards to govern these concerns are discussed in K. TOMASEVSKI, TOWARDS HUMAN RIGHTS CONSIDERATIONS IN DEVELOPMENT ASSISTANCE (to be published by the Danish Center of Human Rights in December 1988). *See also* ADJUSTMENT WITH A HUMAN FACE: PROTECTING THE VULNERABLE AND PROMOTING GROWTH (G.A. Cornes, R. Jolly, F. Stewart eds. 1988) (collection of papers, primarily case studies, dealing with the impacts of "economic adjustment" and "structural reforms" on various categories of the poor. Special attention is paid to health and child care services, food supplies and prices and nutrition, basic educational programs and related concerns.

In March 1988, the U.N. Economic Commission for Africa sponsored a meeting of African development and financial experts to emphasize "the human dimension of Africa's recovery and development." *See, e.g.* R.H. Green, The Human Dimension as a Test and Means of Achieving Africa's Recovery and Development, (paper presented to the above conference emphasizing the need to link the "human dimension" to human rights standards).

projects consume much of the money loaned and most of the other forms of assistance provided to the poorer countries. The World Bank is constituted to aid projects, and so are many other IDAs. These projects are seen as a critical means of addressing conditions which constrain productivity, growth, and betterment of people's lives. Of course, projects can vary greatly in purpose and scale[4], but the impacts of many of them on the human rights of identifiable groups are often foreseeable, and when this relationship between project and people exists, so does the duty to protect and promote rights of affected people. Establishment of rules and policies to meet this obligation will also make it easier for IDAs to analyze human rights issues arising in connection with other kinds of activities and in other areas of concern.

Moreover, lawyers and others interested in the role of "Human Rights in Development" must focus much more clearly and explicitly on ways development projects can, and so often do, inflict cognizable harms on discrete groups of people[5]. These harms are "proximately caused" by official practices which ignore, usually by dint of insensitivity and negligence (and sometimes through advertent disregard) the basic rights of project-affected people. These harms are the product of "wrongdoing," for an essential purpose of rights law is to impose duties on powerwielders to protect those basic interests which underlie basic rights. The more a "development" undertaking may impact on those interests, the more the need to put it under a "rule of law" sensitive to the rights of those affected. Unfortunately, too many lawyers, both those who counsel IDAs and those who write as scholars of "human rights law" or of "law and development," have ignored these concerns.

Too many development projects have been uninformed about human rights and unaccountable to the human "targets" of their activities. The law governing these projects has often been determined *ex parte* and often treated as an "official secret" even as it has been unilaterally imposed on communities and "target" peoples. In that sense, development projects have been lawless activities, capable of engendering mischief and

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4. *See, e.g.* BAUM AND TOLBERT, *supra* note 1.

5. Much of the literature on "human rights and development" is too abstract to be very useful. It often fails to focus on: rights which are particularly relevant to development processes; the way these rights are implicated by development programs; the legal wrongs inflicted when they are ignored and the processes whereby abstractly defined rights gain content and social significance when particular victim groups seek to demand the protections and measures to secure the basic interests underlying the rights asserted. It is, perhaps, impossible to develop useful dialogue about human rights without focusing on concrete cases which illuminate these and other aspects of the problem. *See, e.g.*, C.J. Diaz and J.C.N. Paul, *Developing Human Rights to Food as a Legal Resource for the Rural Poor: Some Strategies for the Rural Poor*, in THE RIGHT TO FOOD, 203-213 (P. Alston and K. Tomasevski eds. 1984); Dias and Paul, *Developing Legal Strategies to Help Combat Rural Impoverishment: Using Human Rights and Legal Resources* in THE INTERNATIONAL CONTEXT OF RURAL POVERTY IN THE THIRD WORLD: ISSUES FOR RESEARCH AND SOCIAL ACTION BY GRASSROOTS ORGANIZATIONS AND LEGAL ACTIVITIES 231-267 (Dembo ed. 1986) [hereinafter Dembo]

shocking injustices.

PART I

INTERNATIONAL HUMAN RIGHTS LAW: ITS SOURCES, CONTENT, AND RELEVANCE TO THE PROCESSES OF DEVELOPMENT

Human Rights law is a new, perhaps "revolutionary," component of international law[6] which has emerged over the past four decades, but particularly the last two. Human rights have evolved from a set of vague, "soft," aspirational pronouncements of the international community to a body of "hard" law principles which not transcend state law and empower people everywhere to demand their recognition.

The original source and first great step to create this growing body of law was the U.N. Charter which imposes the *obligation* on all member states, individually and through collaboration, to "promote" the "development" and "recognition" of "human rights," everywhere[7]. This obligation reflects an essential purpose of the U.N. system and the law which it is supposed to create. It is an obligation which should be assumed by all international agencies which operate within that system.[8]

The next step was adoption of the Universal Declaration of Human Rights of 1948 which declared the "universal" rights to be developed and set forth a "common standard of [human rights] achievement" for "all peoples" as well as "all nations."[9] This Declaration has been accepted and repeatedly affirmed by the U.N. community of states in a wide variety of international instruments. For example, in Africa, all OAU states "reaffirmed" their "allegiance" to the Universal Declaration when they adopted the OAU charter; and, once again they "reaffirmed their adherence to its principles" when they adopted the Banjul African Charter.[10]

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6. For an extensive historical treatment of the evolution of human rights as a major dimension of international law, see L.B. SOHN AND T. BURGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973). *Compare* L.B. Sohn, *The New International Law: Protection of Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982).

7. *See, e.g.*, the U.N. CHARTER, arts. 1, 55, 56.

8. *See* J. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. AND MARY L. REV. 527 (1976) ("References to human rights run through the Charter like a golden thread"). Many of the major U.N. agencies, have become vehicles for promoting human rights conventions or resolutions. On the roles played by ILO, FAO, WHO and UNESCO in the drafting of Covenants, see P. Alston, *The United Nations' Specialized Agencies and the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 18 COLUM. J. TRANSNAT'L. L. 79 (1979). *Compare* T. MERON, HUMAN RIGHTS LAW MAKING IN THE UNITED NATIONS (1986) and A.G. MOURER, INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE (1985). For some examples relevant to the problems reviewed here, see *infra* notes 15,16, and 21. The World Bank was not created as an institution within the U.N. system (it was a product of the Bretton Woods Conference which pre-dated the U.N..) *See* E.S. MORGAN AND R.E. ASHER, THE WORLD BANK SINCE BRETTON WOODS 11-23 (1973).

9. G.A. Res. 217A, U.N. Doc. A/810 (1948). The quoted language is from the Preamble.

10. *See* Article 2 of the Charter of the Organization of African Unity and the Preamble to The African Charter on Human and Peoples Rights *adopted* June 27, 1981, OAU Doc.

Indeed, the human rights "principles" asserted in the Universal Declaration are now recognized as part of the "customary law of all nations" and enforceable as international law.[11]

The third step was the adoption (in 1966 by the U. N. General Assembly) of the International Covenant on Civil and Political Rights (Political Rights Covenant) and the Covenant on Economic, Social, and Cultural Rights (Economic Rights Covenant).[12] These covenants were products of a deliberate effort to convert the "inalienable rights" previously set out in the Universal Declaration into more explicit treaty obligations. Even though the covenants have not been universally ratified and incorporated into all national systems of law, and may never be, they are now treated as statements of rights which are universal, deserving of respect everywhere.[13] They reflect "hard" international law, because they are, in effect, simply more elaborate assertions of the earlier Declaration.

A fourth, very important step has been the development of rights guaranteed by the covenants through various international conventions promulgated by the U.N. Assembly and by the world congresses of the ILO and other U.N. agencies. Many of these conventions, notably Article 14 of the U.N. Convention on the "Elimination of All Forms of Discrimination Against Women"[14] and a number of conventions of the ILO, such as the Convention on Rural Workers[15] which is discussed below add content to those universal rights which are most relevant to development processes; they have been drafted by Third World actors with third-world, rural contexts in mind. They are quite specifically addressed to the needs of peasants and other kinds of rural workers, male and female; they are very relevant to the work of IDAs, because they spell out rights to be

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CAB/LEG/67/3, *reprinted in* Report of the Secretary General on the Draft African Charter on Human and Peoples Rights, OAU Doc. CM/1149 (XXXCII) (Annex II) (1981).

11. *See, e.g.*, the materials in INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 56-57 (R.B. Lillich and F.C.Newman eds. 1979). *See also*, Humphrey, *supra* note 8 and Szabo, *Foundations of Human Rights and Subsequent Developments* in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS (K. Vasak, ed. 1982).

12. *See*, International Covenant on Economic, Social, Cultural Rights (adopted Dec. 16, 1966), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/ 6316 (1966) and International Covenant on Civil and Political Rights adopted Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966). These covenants entered into force on Jan. 3, 1976 and March 23, 1976, respectively.

13. Over 80 nations have ratified both covenants; *see* L. HENKIN, R. PUGH, O SCHACTER, AND H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 524 (1986). The Covenants and the Universal Declaration are often described as the "International Bill of Rights." For discussions of their status, see, Szabo *supra* note 11.

14. *See* G.A. Res. 34/180, 34 GAOR Supp. (No. 46) at 193 *entered into force* Sept. 3, 1981, U.N. Doc. A/34/46 (1979). Over 80 states have ratified this.

15. ILO Convention No. 141 (Rural Workers' Organizations Convention) adopted at the 60th (1975) session of the International Labour Conference. Rural Workers' Organizations Convention, ILO Convention No. 141 *adopted* 1975, at the 60th session of the International Labour Conference. This Convention is essentially an extension of Convention No. 87 (Freedom of Association and Protection of the Right to Organize) adopted by the International Labour Conference of 1948.

protected and promoted through development processes.[16]

A fifth step has been the repeated reaffirmation, incorporation, and elaboration of these basic rights in resolutions and declarations of the General Assembly. For example, the long-debated, Third World-sponsored Resolution 32/130 of 1977[17] reaffirmed the "indivisibility" and "interdependence" of the political and economic covenants and the "inalienable" character of the rights they set out. The 1986 declaration on the "inalienable Human Right to Development" is a significant further step. This declaration, adopted by an overwhelming vote (all Third World countries in favor) asserts, in effect, that international human rights are indispensable, interdependent ends and means of "development" and international development agencies are bound to promote them.[18]

A sixth step has been the reaffirmation of allegiance to these various instruments and to this lawmaking process in the several regional covenants on human rights, such as the Banjul "African Charter on Human and People's Rights," drawn up within the OAU system.[19]

A seventh important step has been the repeated linking of these rights to "development" policies and strategies in the reports and resolutions of U.N.-sponsored World Congresses which have focused on particular kinds of "development" issues. One example is the famous 1976 International Labor Organization (ILO)-sponsored Congress on World Employment which formulated the "basic needs" approach to development, an approach which proclaimed the primacy of food, health, and education in development planning and the role of "participation" in the realization of basic needs.[20] Another example is the centerpiece resolution of the 1979 FAO-sponsored World Congress on Agrarian Reform and Rural Development which reaffirmed the central importance of the "basic" right of "participation" in development processes and the rights of rural workers to form their own organizations as vehicles of participation.[21]

A final development has been a growing awareness among IDAs of

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16. *See* ILO Organizations of Rural Workers and Their Role in Economic and Social Development, Report IV(1), International Labour Conference, 59th Session (Geneva 1974). A number of other ILO conventions are very important, *e.g.*, the Plantations Convention *adopted* in 1958 No. 110, *reprinted in* THE RIGHT TO FOOD: GUIDE THROUGH APPLICABLE INSTRUMENTS (K. Tomasevski ed.1987), an extremely valuable collection of international instruments relevant not only to "right to food," but more generally to the role of rights in development.

17. G.A. Res. 32/130 art. 1, (adopted December 16, 1977).

18. G.A. Res. 41/128, arts. 1,2,6,8, and 9 (adopted December 4, 1986).

19. The Banjul Charter cited Note 10. Article 22 of this charter also guarantees to "all peoples" the "rights to their social and cultural development."

20. *See* International Labor Organization Meeting Basic Needs: Strategies for Eradicating Mass Poverty and Unemployment. Conclusions of the World Employment Conference of 1976 (ILO 1976).

21. Declaration of Principles and Program of Action. Report of the World Conference on Agrarian Reform and Rural Development (FAO 1979) *reprinted in* THE RIGHT TO FOOD *supra* note 16 (Doc. No. 32) *See* Article III of the Program of Action entitled, "People's Participation."

their obligations to build more explicit human rights policies and "law" into their activities. This awareness has evolved from concerns about the wisdom and legality of providing development assistance to lawless governments which systematically and notoriously violate the rights of their people.[22] In part, this awareness has evolved from angry public reactions in many parts of the world to the harms wrought by those more notorious, IDA-financed projects which have produced environmental destruction, human displacement, and other rights violations.[23] Responding to critics of these "development disasters," the World Bank has promulgated new policies and "internal law" designed to secure adequate protections against harms inflicted on both environments and people by projects which provide extensive changes in physical and social environments.[24] Continuing controversy over these projects, with more emphasis on the need to help victims of "development disasters" to fight back, is forcing more focus on the place of rights in law governing development projects.

There is also a growing awareness that rights must be *promoted* as well as protected. Several years ago, the World Bank, conscious of a need to develop better social analysis of its projects, initiated a series of studies concerned with the role of participation in development projects.[25] If the "sociological" conclusions of these important studies can be merged with a legal understanding of rights of participation, one may hope for significant changes in the Bank's operating procedures. The now-celebrated 1987 "Winegard Report" of a select committee of the Canadian Parliament emphasized poverty-focused projects as the first priority and, as a corollary, the need to use projects to advance respect for human rights.[26] The Canadian Human Rights Foundation (CIDA) is now studying ways to respond to this command. Similarly, the Scandinavian aid agencies have initiated a series of consultations to explore the subject.[27]

Thus, the role of human rights in law governing development assistance is no longer a subject for abstract, academic debate. The problem for IDAs is to develop new, explicit policies and rules which will translate their avowed human rights commitments into action; that task calls, in part, for a more sensitive understanding of relationships between particular kinds of basic rights and various kinds of development activities.

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22. TOMASEVSKI *supra* note 2, (especially the review of the development of human rights concerns within various IDAs).

23. For studies of some of these projects see *infra* notes 71-74. For discussion of recent developments, see Hunger Notes, Newsletter of the World Hunger Educational Service, Vol. 13, Nos. 9 and 10, 1988.

24. *See infra* note 73.

25. *See* PUTTING PEOPLE FIRST: SOCIOLOGICAL VARIABLES IN RURAL DEVELOPMENT (M. Cernea ed.1985).

26. *See supra* note 2.

27. *See supra* note 2

A GENERAL APPROACH TO UNDERSTANDING THE IMPORTANCE OF RIGHTS IN RURAL DEVELOPMENT

It is sometimes asserted that the rights now declared to be "universal" are foreign to the cultural and political traditions of many peoples in the Third World, notably in Asia and Africa. We are occasionally told that, when people are not "educated" enough to understand their rights, at least rights of a "political" character, then they must be denied those rights until some specified time. We are even sometimes told that rights (notably those of the poor and powerless) must be "traded off" in order to realize the benefits of "economic growth" (however inequitably distributed) or "political stability" under a current political regime (however autonomous and authoritarian).[28]

Invariably, these claims are made by political or intellectual elites, often in the context of efforts to justify forcible imposition of policies and decisions or an alien ideology upon "the masses." There is little evidence that those who preach those messages do so as authentic surrogates of the people they would make rightless, and even less evidence that the poor would *knowingly* entrust all their rights to those who would rule them in these ways.[29]

The problem is that poor people, notably rural people, may know very little about legal concepts of human rights and how to use them. Furthermore, they may presently lack the "legal resources" (i.e., the capacity to use law) and experience necessary to assert their rights. From historical perspectives, it may be that notions of "rights" are alien to

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28. For a good review of the "trade off" arguments, see R.E. Goodin, *The Development-Rights Trade-Off: Some Unwarranted Economical Political Assumptions*, 1 UNIVERSAL HUMAN RIGHTS 32 (1979). It was certainly fashionable in the 1960s and early 1970s to express skepticism over the role of "western" human rights in the processes of development-emphasized "growth" and "modernization" strategies, planning, and efficient "development administration." *See e.g.*, C.J. Dias and J.C.N. Paul, "*Lawyers, Legal Professions, Modernization and Development*" in LAWYERS IN THE THIRD WORLD: COMPARATIVE AND DEVELOPMENTAL PERSPECTIVES 11-25 (Dias, Luckham, Lynch and Paul eds. 1981). The cultural context of rights development in Third World countries will be subjected to analyses in a forthcoming volume of papers edited by Francis Deng and Md. Abdul An-'Naim, originally presented at a seminar held at the Woodrow Wilson Center (Washington, D.C.) in June 1988 [hereinafter seminar].

29. Compare., M. Haile, *Human Rights, Stability, and Development in Africa: Some Observations on Concept and Reality*, 24 VA. J. OF INT'L LAW 575 (1984) which reviews some of the debates, including those within the U.N. system on this point. *See also*, Md. A. Rahman, The Roles of and Significance of Participatory Organizations of the Rural Poor in Alternative Strategies of Development (to be published in a forthcoming ICLD volume on the roles of Participatory Organizations of the rural poor as vehicles for self-reliant development). In this essay, Rahman (a sociologist who studied grass-roots organizations in Asia for the ILO) discusses the importance of generating knowledge of law — notably of rights guaranteed by law — within organizations of the rural poor; when such knowledge helps people to understand how law can be used to legitimate specific claims or demands, it leads to empowerment in both psychological and political terms and leads groups to challenge official practices which are now deemed wrong and harmful by the group.

many of the diverse religions, cultures, and structures which are the heritage of many different peoples in the Third World. One seldom finds "western" (or "socialist") rights doctrine embedded in the language or political and legal structures of "traditional" societies, but one certainly does find deep commitments to the basic concerns, values, and needs which underlie the concept of rights. Traditional societies used different means (e.g., reconciliation, peer pressure) to secure respect for these interests.[30]

But the imposition of the "modern" state, "modern law" and language, and the imposition of "modern" monetarized economies (and the cultures which attend them) forces the issue of rights. The "modern" state, in virtually all Third World countries, has penetrated into and impacted heavily upon rural people: it imposes taxation and other means to appropriate surplus; it expropriates land; it imposes a local, usually autonomous officialdom, including authoritarian police and courts; all too often, it imposes coercion and systems of corruption. The imposition of the "modern" state without protection of rights may indeed have characterized history of state formation everywhere at earlier times, but it is a condition which the world community, organized through the U.N. system, now condemns. People in the Third World countries have the right to know that they have basic rights and to struggle to assert and adapt these very broad guarantees to their circumstances and concerns.[31]

The imposition of "development" forces the issue even more. Development activities are usually financed, in part, by IDAs and multinational firms. Development may mean decisions to relocate people away from their ancestral lands in order to build dams, airports, plantations, and industrial or urbanized areas, or decisions to convert traditional farmers into commercial producers for world markets, or decisions to convert traditional tenants into wage laborers. Even the most benign, "poverty-centered" development projects entail some forcible external intervention into people's lives which may produce adverse impacts.[32]

In this context, it seems misleading to suggest that rights are some-

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30. *See, e.g.*, K. Wirada, *Human Rights: An Akan Perspective*, an essay to be published in Deng and An Naim,in seminar *supra* note 28. My own essay for this volume elaborates the points made here.

31. The Human Right to Education guaranteed by Article 13(1) of the U.N. Convention on Social, Economic, and Cultural Rights is, in part, a guarantee of access to that kind of knowledge which people particularly need in order to satisfy basic needs and become self-reliant members of their polity, capable of demanding protection of their rights. The imposition of the law and structures and "development" programs of the modern state make knowledge of the rights discussed in this paper essential to rural people. *See supra* note 12. The case for demanding that "modern" states respect "universal" human rights becomes especially clear when one considers the position of ethnic and cultural minorities and the growing movement to formulate more detailed, tougher international rights instruments in this sphere. For a collection of essays and international materials see THE RIGHTS OF PEOPLES (J. Crawford ed. 1988).

32. *See infra* text accompanying notes 108-110.

how irrelevant because people seem to lack the knowledge and means to assert them. A starting point may be to understand several propositions about the nature of basic human rights and the processes which bring them into a real existence in quite different social settings.

1. *Interests.*[33] Rights are legal devices which have been conceived and created within "modern" systems of law to protect local interests: "basic" rights are concerned with securing widely shared, deeply felt needs, values, and concerns. The basic interests of the rural poor in Third World countries are different than those of urban elite and, often enough, rural elites. The basic interests of a self-provisioning family in the land they use, in the food system on which they rely, in access to essential knowledge and resources are unique to people in that situation.

Similarly, the basic interests of rural women may differ in part from those of men. Rural communities may not only compete with cities for essential services; they may also require very different forms of services and structures to provide them. Rural workers may suffer when they are forced by government regulation or unconscionable contracts imposed by state enterprises to sell their produce or labor for ruinous returns. They are often denied rights to bargain for better terms. The identification of the particular interests of a particular rural group or community obviously calls for their participation, their articulation of their interests.

2. *Empowerment.*[34] Rights legitimate the efforts of people, acting collectively to identify and articulate interests. Rights give people the power to demand appropriate protections when they are threatened and to demand redress sufficient to restore an interest when it has been harmed. A rich literature on participation teaches that, when people gain knowledge of the legitimacy of these efforts, they become empowered in psychological terms, hence more capable of self-reliant involvement in their polity, more capable of developing human rights geared to local needs and more capable of making democratic structures work over the long run.

3. *Component Rights.*[35] Basic rights guaranteed by constitutions or

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33. The "rights-interests" analysis discussed in this paragraph is elaborated in Diaz and Paul, *supra* note 28. *See also* M. Haile, *supra* note 29.

34. On rights as laws which legitimate the exercise of power (e.g., to protect, assert demands, claims in courts, etc.) to demand protections for the fundamental interests protected by the "basic" right, see C. Dias and J. Paul, *Developing Legal Strategies to Help Combat Rural Impoverishment: Using Human Rights and Legal Resources* in THE INTERNATIONAL CONTEXT OF RURAL POVERTY IN THE THIRD WORLD: ISSUES FOR RESEARCH AND SOCIAL ACTION BY GRASSROOTS ORGANIZATIONS AND LEGAL ACTIVISTS 231-267 (Dembo ed. 1986). The "empowerment" perspective is often neglected in international discourse (among U.N. "elites" and scholars) on human rights; it is often assumed that rights create established "standards" which become known and respected or enforced by responsible governments. This assumption defies everyday experience and neglects the history of rights development in different times and places. *See also, supra* note 30.

35. The concept of "component rights" developed here is explored in Dias and Paul, *supra* note 34. *See also,* C. Dias and J. Paul, *Developing the Human Right to Food as a Legal Resource for the Rural Poor: Some Strategies for NGOs* in THE RIGHT TO FOOD (P. Alston and K. Tomasevski eds. 1984).

the "International Bill of Rights" are usually stated in very general terms. These rights can only gain meaning when people who believe that their basic interests are threatened demand protections appropriate to the threat. The process of rights development is, in part, a process of developing particular components rights geared to the context of specific needs of particular groups for particular forms of protection of those basic interests which are promised protections by declaration of the general right. The right of rural women and children to food, may, in a particular community, force our focus on the need to protect their access to land sufficient to supply family needs, or on problems of environmental degradation, or on needs for better storage or distribution systems, or on other practices which threaten their supply of or access to food, water, health care, and other necessities. The causes of hunger help us to understand the component protections (or rights) which give meaningful content to the right to food in particular social and physical environments.

4. *The Symbiotic Relations Between Basic Rights.*[36] All basic rights seem grounded in a belief that they may help one to live a life befitting the dignity we now ascribe to the human person. Rights to "food," "equality," and "participation" are simply extensions of that principle, and the enjoyment of each of those rights requires enjoyment of others. The right to food (e.g., the protection of local, rural food systems) can only be protected through exercise of rights of participation. The central purpose of participation is to promote and protect enjoyment of social and economic rights. In this context, the alleged dichotomy between "economic" and "political rights" should be seen as mischievous jurisprudence.

5. *The Content of Some Rights Particularly Relevant to Development.* For the Third World, rural poor and protagonists of *their* very real, but regularly neglected interests and needs, four basic, "universal" rights seem important. They are: (1) "rights of participation," (2) "basic needs rights" to food, health education, and security in land, (3) "rights of equality," and (4) the emerging "human right to development."

(1) *Rights of Participation.*[37]

These rights are guaranteed by the Universal Declaration, the U.N. Covenant on Politics, numerous ILO conventions, and other international

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36. *See, e.g.* the preambles to both of the U.N. covenants (paragraphs 1, 2, and 3) and the U.N. Declaration on the Human Right to Development, arts. 1, 2, and 9 *supra* note 59, for official recognition of this view. *See also*, G.A. Res 32/130 of Dec. 16, 1977, par. 1, discussed in Nanda, *supra* note 2.

37. While various, broadly stated rights of participation (e.g., in politics and governance, in worker associations) are set out in international instruments (*see infra* note 38), rights of participation in relation to rural development only began to receive the emphasis they deserved (within the U.N. system) after an international consensus was achieved by the 1976 World Employment Conference regarding the importance of "people," "poverty," and "basic needs" to focus on development. *See* for a summary of this history and a collection post 1976, important U.N. sources on participation and development, Nanda, *supra* note 2. *See also infra* note 123.

legal instruments.[38] On many occasions, the U.N. General Assembly and world congresses sponsored by U.N. agencies have declared these rights to be essential to the processes of development.[39] Indeed they are, for, unless people can exercise rights of participation, they are powerless to assert and secure other rights.

Yet, participation is also an elusive concept; the term is often used ambiguously in development literature. Participation can be promoted to perform many functions from seducing and co-opting to more authentic power-sharing, and from imposing the will of some majority to achieving consensus, and "due process" for those whose interests are most at stake. Additionally, there are many forms of participation from voicing opinions and voting to protest and strike, and from challenging decisions in tribunals of review to sharing power to make the decisions. Participation can come at many stages of an activity from initiation and planning a project through implementation to review, regulation, and evaluation of its management.[40]

Thus, rights of participation can vary in purpose and scope; they must be adapted to the occasion. The more a particular group's basic interests are especially affected by a proposed development activity, the more they must be capacitated and empowered to identify, assert, and protect their interests in relation to that activity. This goal, mandated by law, can only be realized by according a broad array of rights, such as rights of project-affected people to enjoy:[41]

a) *Timely notification of the project proposal and access to information about it.* These rights which are frustrated by rules and policies of both IDAs and governments which regularly treat development plans, decisions, reports, and operating rules as state "secrets."

b) *Access to "legal resources".* This right is frustrated by failures to

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38. *See, e.g.*, arts. 19, 20, 21, 22, and 27 of the Declaration; arts. 1(1), 8(1), and 13(4) of the U.N. Covenant on Social, Economic, and Cultural Rights; arts. 1(1), 18, 19, 21, 22, and 27 of the Covenant on Civil and Political Rights. The ILO conventions are cited *supra* notes 15, 16.

39. *See, e.g.*, G.A. Res. No. 32/130 (Dec. 16, 1977); *See also* the U.N. Declaration on the Human Right to Development, *infra* note 59 and sources cited, *supra* notes 43, 44.

40. For a valuable discussion of these problems and the forms and roles of participation in the context of rural "development" and analysis of some of the legal and political implications, see R. Green, *Procedures and Professionalism and/versus Participation and Popular Organizations: Some Problems of Accountability and Community Action* in THIRD WORLD LEGAL STUDIES 1982 - LAW IN ALTERNATIVE STRATEGIES OF RURAL DEVELOPMENT 11-33 (1982).

41. Despite all the rhetoric on participation, comparatively little attention has been paid to detailed analysis of the many component rights needed to guarantee *meaningful* participation. Compare Green, *supra* note 40. *See* a number of the essays in THIRD WORLD LEGAL STUDIES 1982 in the nature of "case study" and "overview" contributions designed to expose and explore the *legal* implications of the development of "participation" in different developmental contexts. A forthcoming ICLD volume ("Law, Participation, and People-Centered Development" (1989)) will explore component rights of participation in the context of development.

provide rural people with knowledge of their legal rights and capacities to exercise them.

c) *Power to form their own self-managed associations and engage in collective activities.* These rights are regularly frustrated by national regimes of law and practice regulating formation of associations, and by practices of local officials which deter formation of "unauthorized" groups and collective action, and by deliberate efforts of development agencies to co-opt and manipulate grass roots collective activities.

d) *Freedom of communication.* This right is regularly suppressed by oppressive enforcement of laws dealing with public demonstrations and protest; often the only means of expression available to poor people.

e) *Access to the media.* This right is regularly frustrated by government monopolization of the media, or by social gaps which separate the independent press from rural communities, notably the concerns of the rural poor.

f) *Access to officials and agencies.* This right is frustrated by the absence of regimes of law requiring public hearings on measures proposed and due process for people who claim to be harmed by official actions.

g) *Access to institutions (courts or other agencies) which can redress legal harms and impose accountability.* These rights regularly are frustrated by the absence of legal resources for project-affected people, by the insensitivity of courts to the interests of project-affected people, by legal doctrines such as "immunity," "standing," and "justiciability" which can be used to insulate agencies and officials.

Thus, the human rights concept of participation is much more "tough" and explicit than the "soft" notion often propounded by development "experts" who, insensitive to rights law, discuss participation as if it was a sociological variable to be manipulated at the discretion of those who control projects. Perhaps the most important of the component rights which must be promoted are rights of association and collective action. Since, individually, poor people are usually uninformed, powerless, and historically excluded, their participation can only be developed and exercised through the formation of endogenous, self-managed organizations. Rights of project-affected people to form such groups and engage in collective activities have been clearly recognized and emphasized in many international instruments. For example, the 1979 FAO-sponsored World Conference on Agrarian Reform and Rural Development declared, in its centerpiece resolution, that:

> Participation of the people in the institutions and systems which govern their lives is a basic human right and also essential for realignment of political power in favor of disadvantaged groups and for social and economic development.
> Rural development strategies can realize their full potential only through the motivation, active involvement, and organization at the grassroots level of rural people with special emphasis on the least- advantaged strata, in conceptualizing and designing policies and pro-

> grams and in creating administrative, social and economic institutions, including cooperative and other voluntary forms of organization for implementing and evaluating them.[42]

The resolution then went on to demand that all governments *ratify* and promote recognition of ILO Convention 141.[43] This convention, overwhelmingly adopted by the International Labor Conference of 1975 (and now ratified by a large number of Third World countries), calls for legal recognition of a universal right of all "rural workers" to form rural organizations "of their own choice," free from state interference. The term "rural workers" includes smallholders, tenants, laborers, sharecroppers, and rural women in their multiple roles. The Convention declares in Article 3 (with emphasis added):

> 1. All categories of rural workers, whether they are wage earners or self-employed, shall *have the right to establish and to join organizations of their own choosing without previous authorization.*
> 2. The principles of freedom of association shall be fully respected; rural workers' *organizations* shall be independent and voluntary in character and shall *remain free from all interference, coercion, or repression.*
> 3. The *acquisition of legal personality* by organizations of rural workers shall not be made subject to conditions of such a character as to restrict the application of the provisions of the preceding paragraphs of this Article.
> 4. In exercising the rights provided for in this Article, *rural workers* and their respective organizations, *like other persons or organized collectives, shall respect the law of the land.*
> 5. The *law of the land shall not be such as to impair*, nor shall it be so applied as to impair, *the guarantees* provided for *in this Article.*

A "recommendation" enacted by the same conference,[44] in effect, sets out some assumptions explaining the intended scope of these guarantees. Rural organizations are envisioned as vehicles to generate knowledge and awareness, to "defend" the "interests of rural workers," and enable more effective "participation" in state structures. This includes participation in the "formulation and implementation" of "programs of rural development" and participation in the "evaluation" and determination of accountability of those who manage them. Furthermore, rural worker organizations are vehicles to secure direct access to goods and services controlled by the state. They are also vehicles for initiating local, self-

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42. This is Article III of the "Programme of Action" adopted by the Conference. For a full text of the Declaration and Programme approved by the Conference, see Tomasevski (ed.), *supra* note 16, at 90.

43. *Id.* Article III(A)(1) of the "Programme of Action," The entire texts of Arts. III(A), (B) and (C) contain a list of steps to be taken to promote "people's participation" in agricultural and rural development.

44. The entire text of the 1975 Rural Workers Convention, No. 141 and Recommendation No. 149, which unanimously adopted to accompany it is set out in Tomasevski, *supra* note 16, at 173-180.

managed, self-help projects and group-managed businesses.

Convention 141 is an exact counterpart of the much-celebrated Conventions 14 and 87 which deal with industrial workers. A great deal of "law" has been developed by the ILO through specific interpretations of these earlier conventions on worker organizations including interpretations requested when workers' organizations have alleged that particular laws or practices violate their rights. Most of this jurisprudence can be carried over by analogy to 141.[45] Convention 141, like 14 and 87, could become an international Magna Carta for rural workers if they can become empowered to use it in the same way that industrial unions have used these conventions over the years.[46]

Indeed, the state's role as facilitator of these activities, rather than regulator, must be stressed. Clearly, the intention of Convention 141 was that the state, and obviously IDAs which work with states to "develop" rural areas, should assume *affirmative* obligations to foster, not frustrate, autonomous rural workers' structures free from official manipulation, in order to foster free participation. States and IDAs which initiate projects have a *legal obligation* to assure that this is done and done at a point in time, and in ways, which enable participation in every stage of a project cycle.

(2) *Rights to food, health, education, and security in land*

The U.N. Covenant on Economic Rights, and many, later important international legal instruments[47], have declared the existence of the "universal" rights of "all people" to "food," "health," "education," and other necessities of life.

Of course, it is sometimes said that "social and economic" rights, such as the right to food, are not really "rights" at all, because:
a)these rights are expressed in such broad terms that they lack any operative meaning (e.g., what specific entitlements are guaranteed by a right to "food"?), and b)there exist no "legal" remedies to "enforce" these rights (e.g., courts and other forums lack power to enforce demands for food or to mandate remedies for food shortages).

Thus, it is said, these rights are really only affirmations of the moral obligation of governments to provide for basic needs to the best of their capacities. Indeed, some discussions of basic needs rights proceed on this assumption—sometimes even viewing "rights" as justifications for authorization measures which violate other rights.[48]

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45. *See supra* note 16

46. The importance of Convention No. 141 and critique of its coverage (e.g., its failure to address the need to protect people and groups who seek help, generate knowledge and catalyze rural workers, and help them organize and provide other support [information] and advocacy in otherwise inaccessible forums) is discussed in various essays in ICLD's forthcoming volume, "Law, Participation and People-Centered Development," *supra* note 41.

47. *See* articles 11, 12, and 13 of the Covenant. *See generally*, Tomasevski (ed.), *supra* note 16.

48. For references to these claims and discussion of them, see M. Haile, *supra* note 28;

Of course, any government worthy of legitimacy must recognize its moral obligations to promote satisfaction of basic needs. But that hardly ends the matter. The covenants declare that rights to food, health, and education are "human" rights of people which transcend and limit the powers of government and *empower people* to impose accountability on those who abuse these limits. This proposition is crucial when viewed in the context of development projects, because a great many of these activities run roughshod over peoples' interests in health, food, land, and education (i.e., access to knowledge which "enables" one to "participate effectively" in development processes).

Basic needs rights, like the other universal rights in the U.N. Declaration and Covenants, are obvious corollaries to one's right to life and to live that life in ways befitting dignity we now ascribe to human beings.[49] Just as these core values are protected by various civil and political rights (e.g., to the "equal protection" and "due process" of the laws), they are also protected by rights which empower people to demand equitable access to resources essential to a life with dignity. Thus, each of the basic needs rights (like rights of "participation" and "equality") are aggregations of component rights which entitle people threatened or victimized by hunger, disease, and ignorance of essential knowledge to identify, protect, and redress man-made conditions and practices which plainly contribute to those evils.

The challenge is to develop, in very different social contexts, the component rights which enable particular, victimized, or threatened communities to protect and enjoy conditions which enable realization of basic needs. The task is to identify, in particular settings, those particular practices which contribute to impermissible deprivations of basic needs; and it is a task which requires the participation of those affected, for participation rights and basic needs rights are "indivisible and interdependent." This is a self-evident proposition which negates any assertion that there is a dichotomy between "economic" and "political" rights.

The right to food provides an example. While, of course, the causes of food shortages and malnutrition are multiple and complex, it is notorious that rural communities, notably smallholders such as women and children, are usually the first and major victims of a food crisis. It is equally notorious that these crises are, in part, the product of some combination of man-made practices, such as:

-the degradation of physical environments;
-the withdrawal of fertile land from production of basic food crops;
-population increases and shifts;
-poorly planned resettlement schemes;

R. Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Sahara Africa*, 5 HUM. RTS. Q. 467 (1983).

49. *See supra* note 36, H. SHUE, BASIC RIGHTS: SUBSISTENCE AND AFFLUENCE IN U.S. FOREIGN POLICY (1980).

-neglect of smallholders and subversion of indigenous subsistence agriculture and indigenous food systems;
-neglect of infrastructure for local food storage and distribution and the effective working of rural "food systems;"
-unfair terms of trade and discriminatory subsidies which deter production of surpluses or distort their distribution;
-lack of research, credit, extension, and inputs directed towards self-provisioning farmers;
-discriminations against and neglect of women farmers.[50]

These kinds of practices *can* be identified and then remedied by corrective measures; but it is clear from an abundance of studies that those who are threatened or victimized must be parties to the processes of identifying wrongs, wrongdoers, and remedies. Similarly, it is clear that most rural development projects have some impact, or multiple impacts, on the "food systems" of communities to which they are directed. But, quite often, these consequences cannot be adequately understood and estimated without the participation of the very people who will be affected in different ways by the project, who will be the victims of official mistakes or neglect.[51]

(3) *Rights to Equality.*

These rights empower people to prevent or redress discriminatory practices which affect allocation of essential resources, services and opportunity. They are guaranteed by the U.N. Declaration, the Covenants, and (particularly important for present purposes) by the 1979 U.N. Convention on the Elimination of All Forms of Discrimination Against Women (commonly labelled the "Women's Convention.")[52]

Historically, discriminations based on class, ethnicity, sex, and other identities have been built into the political economies of "development" in most countries of the world. In Asia and Africa, these inequalities are legacies entrenched not only by history and culture, but by geography and the social structure of post-colonial states. Much has been written to portray the kinds of discriminations which have been practiced in many countries against peasants and rural workers, regions and cultural or ethnic groups, and depressed castes and rural women. The reform of national law to change these historic patterns is obviously an important subject, but it is one in which the responsibilities and role of IDAs may be, at best, attenuated.

Here, our focus centers on the responsibilities and role of IDAs to empower vulnerable groups to prevent discriminations and promote equality of opportunity *in the context of development projects*, notably

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50. The analysis here is presented in more detail in Dias and Paul, *Developing the Human Right to Food as a Legal Resource for the Rural Poor; Some Strategies for NGOs*, *supra* note 5.

51. *See infra* notes 116, 117.

52. *See supra* note 14.

projects which allocate goods, services, and opportunities.

Article 14 of the 1979 U.N. "Womens' Convention," which should certainly figure largely in the design of IDAs projects, provides a useful approach, because it focuses closely on those rights which are particularly important to rural women in relation to their roles and opportunities in development processes and projects.[53] Note also, that this Convention empowers not only women but all other identifiable groups victimized by discriminatory practices which frustrate opportunities for development.

These practices include:

-discrimination in the allocation of credit, inputs, and other agricultural services;
-discrimination in commodity price-fixing by the government;
-discrimination in identifying needs of particular groups for particular resources or services essential to their needs;
-discrimination in the allocation of services and resources essential to the food production and storage needs of self-provisioning households;
-discrimination against family food-producers (or condonation of discriminations) in regard to rights to control land which they cultivate;
-discrimination in regard to opportunities to form or enjoy membership and equal rights of participation in cooperatives and other structures which provide access to market services and resources;
-discrimination in the relations and dealings between officials and women, or members of others historically vulnerable or dependent groups.

Of course, enactment of formal, generalized legal protections (e.g., via national legislation) is one way to try to prevent these harms. But experience surely teaches that legislating change must be accompanied - perhaps preceded, by grass roots efforts to educate and empower victims of discrimination to understand their rights to equality of treatment.[54] In that way, the victims of discrimination may decide for themselves, in light of their culture, needs, and other factors, what particular practices they need to resist and change, here and now. The function of IDAs is not to impose their model of equality, but to help empower victims of discrimination to articulate and assert their rights as they perceive them. In this perspective, the development of endogenous, self-reliant structures of participation is, again, essential. Agencies which design and administer development projects are often in a position to encourage these processes, just as they are positioned to discourage acts of discrimination by other agencies or officials. It should be the obligation of IDAs to help project-

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53. This article was first drafted by Dr. Natalie Hahn, then a specialist in agricultural development and women farmers at the FAO, who took leave in the latter '1970s to study law. (Dr. Hahn is also the only foreigner I know to be made an Honorary Chief in Nigeria.) The honor reflects her many efforts to help women and the development of cassava cultivation while based at the International Tropical Agricultural Institute at Ibadon.

54. *See* S.W. YUDELMAN, HOPEFUL OPENINGS: A STUDY OF FIVE WOMEN'S DEVELOPMENT ORGANIZATIONS IN LATIN AMERICA AND THE CARIBBEAN (M. Schiver ed. 1987), EMPOWERMENT AND THE LAW: STRATEGIES OF THIRD WORLD WOMEN (1986).

affected people to understand their rights to equality and to insist that there be processes and remedies enabling them to vindicate those rights.

(4) *The Right to Development.* This a new, inadequately understood addition to the array of rights developed through the U N. system. Some of its content must be clarified, and some is problematic. But insofar as the right proclaimed is a *human* right, which is explicitly concerned with the role of other well-recognized rights in the processes of development, it must certainly be taken seriously by those who engage in development activities.

The idea of "development" as a *human* right owes much to the distinguished African jurist, Keba Mbaye. His influential advocacy in the 1970s inspired others to help formulate the concept and move U.N. agencies (e.g., the Commission on Human Rights) into action.[55] A significant step was taken when, in 1979, the Secretary General of the U.N. (responding to a request from the Commission) issued a report on the "existence" of the right.[56] Despite its verbosity, incomprehensibility in various places, and other flaws, that Report conveyed an important message. The Secretary has declared, "a general consensus exists as to the elements of the concept of development." The "elements" were:

> 1. The realization of the potentialities of the human person in harmony with the community should be seen as the central purpose of development.
> 2. The human person should be regarded as the active subject, not the passive object, of development processes.
> 3. Development requires the satisfaction of both material and nonmaterial basic needs as a basic priority.
> 4. Respect for human rights and redress of historic discriminations are fundamental to the development process.
> 5. People must be able to participate fully in shaping change in their social and physical environments; they have a basic right to do so.
> 6. The achievement of individual and collective self-reliance must be an integral part of these processes.

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55. *See* for an instructive but brief history, P. Alston, *Development and the Rule of Law: Prevention vs. Cure as a Human Rights Strategy*, in *Development, Human Rights, and the Rule of Law* 31 (International Commission of Jurists 1981). *See also* K. Mbay, *Le Droit au Development comme un Droit de L'home*, 5 REVUE DES DROITS DE L'HOMME 503-534 (1973).

56. The 1979 Report of the Secretary General was issued under a title containing about 45 words, arranged in a highly problematic syntax, which probably says something about the intellectual rigor of the U.N. "experts" who prepared it. Nevertheless, the 1979 Report has become a significant foundation for an understanding of the human right to development, *see. e.g.*, the International Dimensions of the Right to Development as a Human Right, U.N. Doc. E/EN4/1334 (1979). Karal Vasak then UNESCO's legal adviser, helped to stress the importance of understanding the evolution of human rights concepts and paradigms (i.e., "generations of rights and the growing importance of international cooperation in promoting human rights through development efforts. *See, e.g.*, K. Vasak, *A Thirty Year Struggle — the Sustained Efforts to Give Force of Law to the Universal Declaration*, UNESCO Courier, Nov. 1977, at 24.

With this concept of people-centered development as a major premise, the Report declared that the exercise of rights already guaranteed "by the International Bill of Human Rights," by states acting individually and collectively through international organizations, was basic to the processes of planning and producing "development." No doubt, many proponents of the "new" right also saw it as a "right" of states, a "right" which imposed duties on affluent states to aid poorer ones.[57] The formulation of those (state-centered) "rights" and the means to realize them remains a problematic and controversial, albeit important, subject of internal law. But, from the beginning, the right to development was also seen as a *human* right, one which *empowered people.* Development, as conceived above, was a *process*, and, the right to development (analogous to the right to "due process of law") entitled those people to *processes of development which respect and promote their rights*, notably rights of participation.

The right to development as a "right of people" was incorporated albeit without definition in Article 22 of the Banjul African Charter.[58] A further, very significant step, has been the drafting and enactment of the U.N. Declaration on the Right to Development.[59] It was submitted to the General Assembly in 1986 and approved by a vote of 146-to-1 (the U.S. stood alone in opposition, and eight western governments abstained). The Declaration is hardly a model of clarity[60], but some essential propositions

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57. For the politicized history of the evolution of the Human Right to Development, see e.g., R. Rich, *The Right to Development: A Right of Peoples*, in THE RIGHTS OF PEOPLES, 39-54 (J. Crawford ed.1988).

58. *See supra* note 19. The article speaks of the "right of peoples" to "social, economic, and cultural development."

59. U.N. A/Res/41/128 *adopted* on December 4, 1986.

60. Part of the difficulty with the human right development is that some see it as a "new" right, not one clearly rooted in the Universal Declaration and the Covenants nor a right which has evolved over time from experience and thus has become rooted in a well established consensus as to both content and existence nor a right rooted in any basic, universal human "interest." Compare. P. Alston, *Conjuring up Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607 (1984). Parts of the U.N. Declaration may certainly be subject to this criticism. These parts reiterate familiar but unclear propositions of earlier assembly resolutions. They speak of "rights" of states (Art. 2,3) and impose "duties" on states to promote international "conditions favorable to development" and "a new international economic order." (art. 3). There is a demand for action against "apartheid," "racism," "colonialism" and threats against national sovereignty, threats of war (art. 4) and a demand that all states "promote the establishment of international peace and security." (art 7). These and similar propositions, e.g. the duty of all states to promote disarmament (art. 7), are said to be "indivisible and interdependent" aspects of the right to development. (art. 9). (Note the absence of the word "human" before "right." Whatever may be the merit of these propositions, they seem to be cast in the form of "rights" and "duties" of states to promote or protect state interests or collective interests which historically have been protected by states, by not human rights as these have been identified in many previous instruments. Other articles in the Declaration deal with the notion of "development" as an "inalienable human right" (Art. 1 (1)) rooted in and a logical extension of the "International Bill of Rights" and the U.N. Charter's command that the U.N. system be used to promote human rights.

seem quite clear; and *on these points there may be little disagreement* about the validity of the Declaration:

> -It affirms the concept of "people-centered" development articulated by the Secretary General by declaring that "the human person is the central subject of development,"[61]
>
> -It confirms the principle that human rights are means as well as ends of this kind of development,[62]
>
> -It underscores (as have many other Assembly Resolutions) the central importance of "participation" as both a right (or bundle of rights) and a means to realize other rights in people-centered development,[63]
>
> -It imposes the obligation on national and international development agencies to respect and promote human rights in the processes of development[64]
>
> -It empowers people, notably the intended beneficiaries of development activities to demand accountability to these principles.[65]

A U.N. "Declaration" is a pronouncement which is supposed to carry more significance than an ordinary Assembly resolution, particularly when it embodies an overwhelming consensus, conveys a clear message in regard to the application of established principles of international law to the conduct of existing international practices, and imposes reasonably clear and manageable duties on those who engage in these practices. The Declaration on the Human Right to Development has been criticized because it fails to meet these and related criteria.[66] The criticisms may be understandable insofar as the Declaration asserts the "rights" of states to "peace," "security," development assistance, and a more equitable international order. These conditions may be necessary to the realization of people-centered development, but, when prescribed as "rights," as they are in the Declaration, the prescription may become problematic if the criteria noted above are applied. At the very least, that explains why most major "donor" governments abstained, or in the case of the U.S., opposed the resolution.[67]

But the criticisms are quite misplaced insofar as the fundamental *human* rights message of the Declaration is concerned. The importance of defining "development" in terms of people who are the victims of underdevelopment and maldevelopment and the need to promote *their*

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61. Art. 2(1). Note the use of the word "subject," not object.

62. This proposition is not stated as such, but it is clearly implied. Compare, arts. 1(1), 2(3), 3(2), 6(2), 6(3), 8(2), and 9(2).

63. Arts. 1(1), 2(1), 2(3), and 8(2).

64. Arts. 4(1), 6(1), and especially art. 10.

65. *Compare*, Art. 8(1) and 8(2).

66. *See* I. Brownlie, *The Rights of Peoples in Modern International Law*, THE RIGHT OF PEOPLES 1-16 (Crawford ed. 1988). *Compare*, P. Alston, *supra* note 60.

67. *See*, R. Rich, *supra* note 57. *See* U.N. Doc. A/C/3/41/SR61 (1986) (assembly discussion).

rights through *their* participation in development processes has been a central goal of advocates of the Human Right to Development.[68] In the muddled deliberations leading to that instrument, there has been a consensus on this theme.[69] No one has gainsaid it, and many of the western governments which objected to the Declaration on other grounds, have officially espoused these principles.[70]

Thus, the Declaration conveys a clear message regarding the role of human rights. It speaks to those who do development through long-established international structures and practices; it tells these actors to promote rights, notably through provision for participation, in the design, management and control of development programs. In regard to development projects which impact on people, the import of the command is especially clear. The "law" governing international development projects (e.g., the agreements, operating procedures, and usages) must impose duties to protect and promote the rights of those affected by project activities. This is hardly the assertion of a new right. Rather, it is a logical application of the mandates of existing universal rights law.

PART II
POLICY IMPLICATIONS AND LESSONS OF EXPERIENCE: THE CONSEQUENCES OF IGNORING RIGHTS

Experience with development projects vindicates the normative propositions asserted above:[71]

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68. The International Commission of Jurists was active in organizing efforts to being together NGO activists concerned with people-centered "development" and "human rights in development" in order to draft a statement on the content of a Human Right to Development to submit to the 1981 Working Group of the U.N. Commission on Human Rights charged with the task of formulating the right. (See E/CN.4-Ac.34/WP 10 of 16, November 1981). This statement was later expanded and adopted by an Asian group of NGO experts and is set out in ICJ Newsletter, No. 11 (October-December, 1981), 56-62.

69. *See* Rich, *supra* note 57. *See also* P. Alston, *Making Sapce for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3 (1988).

70. *See supra* note 2.

71. A vast literature (including material published by IDAs) now exists which documents or purports to document the harms to people which result from those kinds of development projects which, by their very nature, inevitably affect the interests of discrete groups of people in discrete ways. Only recently have lawyers and legal scholars begun to pay attention to the need to help those whose interests are seriously threatened or harmed by such projects use law (notably, human rights law in combination with tort, criminal, and other kinds of remedial law) as one means to fight back. Human rights law can have no meaningful existence, unless the victims of rights violation can use law to fight back. Precisely because the countless victims of project wrongs are poor, "ignorant", and often understandably hostile to law and lawyers, they lack "legal resources" (i.e., the capacity to use law) to defend their interests. *See supra* note 5. This may help to explain (but not justify) the relative failure of legal scholars and jurists to participate meaningfully in the processes of developments projects. These themes are developed in International Commission of Jurists, Report of Seminars on Legal Services for the Rural Poor and Disadvantaged Groups in South-East Asia (January 1987) and South Asia (December 1987) (published by the ICJ in 1988). The seminars were devoted to developing strategies to resist those kinds of development projects which impoverish and degrade project-affected peoples. *See* the "keynote ad-

(1) *failure to build enforceable human rights protections* into all stages of "risk-prone" development projects often contributes to the infliction of serious, unredressed harms on vulnerable people;

(2) *failure to promote awareness and exercise* of human rights, notably rights of participation, in all stages of poverty-oriented projects frequently contributes to their failure to reach and benefit intended beneficiaries and, often, to a worsening of their condition.

Risk-prone Projects: The Need to Protect Rights. Certain kinds of development projects are fraught with risks of harms, especially to those who are already vulnerable in economic and political terms. It seems inexcusable that these projects could be initiated and put into motion without according any meaningful participation and due process to those put at risk. When the risks materialize into devastating human harms, it seems even more unjust to proceed through the project phases while denying the victims prompt, full and fair redress. Yet, the history of "development" abounds with illustrations of these wrongful practices.

Infrastructure projects. Projects to construct large dams, major transport and other facilities have been a major source of harms inflicted upon vulnerable people. The environmental consequences of many of these projects are now notorious.[72] Usually, they also produce human displacement and impoverishment. Families are stripped of their means of livelihood. These projects may create new classes of landless workers or new communities of squatters, tenants or resettled people who face continuing risks of further eviction. While attempts are sometimes made to "compensate" victims of displacement, there is considerable evidence to suggest that these programs, at best, fail to provide adequate reparation for all the losses inflicted. Similarly, efforts to "resettle" displaced people are all too often flawed, in both planning and administration, by practices which violate rights and inflict economic and other tangible harms.[73] For

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dress" by Clarence Dias (in the Report).

72. The literature on dams in extensive. *See, e.g.*, E. GOLDSMITH AND N. HILYARD, THE SOCIAL AND ENVIRONMENTAL EFFECTS OF LARGE DAMS (2 vols.) (1984, 1986) and C. ALVARES AND R. BILLOREY, DAMMING THE NARMADA: INDIA'S GREATEST ENVIRONMENTAL DISASTER (1988). "The World Bank financed nearly $6 billion for hydro projects in 1980-82 and nearly $1 billion for irrigation and drainage in 1982 alone," B. Rich, *Multilateral Development Banks, Environmental Policy, and The United States*, 12 ECOLOGY L.Q. 681 (1985), at 701, n. 42. For an "inside" review of some of the World Bank's experience, *see, e.g.*, G. E. Schuh, et al., *Social and Environmental Impacts of Dams*, WORLD BANK AGRICULTURAL AND RURAL DEVELOPMENT DEPT. (1987).

73. On some of the difficulties experienced in involuntary resettlement, see M. Cernea, *Social Issues in Involuntary Resettlement Processes: Policy Guidelines and Operational Procedures in World Bank-Financed Projects*, WORLD BANK TECHNICAL PAPER NO. 80 1988. C. Escudero, *Involuntary Resettlement in Bank-Assisted Projects: An Introduction to Legal Issues*, WORLD BANK, LEGAL DEPARTMENT (1988). (These are recent studies by the Bank's now-well known sociologist and a concerned member of the legal department which attempt to alert Bank staff (and others) to the kinds of problems revealed by Bank experience and discussed here. On experiences in involuntary resettlement programs, *see, e.g.*, INVOLUNTARY MIGRATION AND RESETTLEMENT A Hansen and A. Oliver-Smith (eds.)(1982) (con-

example, involuntary resettlement projects often use such coercive means as separating communities; families often suffer losses of animals and unharvested crops — and hunger, disease and other hardships naturally follow.[74] They are often relocated into unsuitable environments in terms of health, security and self-provisioning agriculture. They are sometimes victimized by corrupt officials and speculators who arrange "sales" of lands for relocation at exorbitant prices. The ultimate outcome of these and other abuses is often further displacement.[75]

Displacement produces political and cultural harms as well as economic damage. Poor people who lose possession of ancestral family land usually lose status and dignity; links to a past, a way of life and security are destroyed. On a larger scale, communities and cultures are dissolved. Displaced people become "refugees," even though they never cross national boundaries; they are peculiarly powerless and, thus, vulnerable to all kinds of other human rights violations. Dependent on officials or others for satisfaction of essential needs, they are often easily deterred from engaging in any meaningful processes of political participation; at the same time, they sometimes become political pawns of those on whom they have become dependent.[76]

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tains many case studies).

74. *See* Studies in Hansen and Oliver-Smith, *supra*; P.L. Bennagen, *Philippine Cultural Minorities: Victims as Victors* in MORTGAGING THE FUTURE: THE WORLD BANK AND IMF IN THE PHILIPPINES V.R. Vose (ed.) (1982). *See also*, Rich, *supra* note 72, at 702 (summarizing testimony on behalf of resettlement victims at Hearings before the Sub-Committee on International Institutions of the House Committee on Banking, Finance and Urban Affairs, 98th Cong., 1st Sess. (1983), entitled Environmental Impact of Multilateral Development Bank-Funded Projects. This Committee has held many hearings on the environmental and social impacts of World Bank projects, sometimes providing a public forum to Third World activists attempting to portray harms done to victims of these projects. *See* Statement of Smith Kothari on Behalf of Lokayan [a network of victim-oriented human rights activists in India] and National Working Group on Displacement Concerning the Environmental Performance of the World Bank in India (to the above committee), May 24, 1988. (Focusing on the Singrauli Thermal Power project, the Bodghant Hydroelectric, the notorious Sardau Sarovan Dam, and the Narmada project; detailed description of effects of displacement).

75. Official corruption and extortion have been widely reported in the Indian press in connection with government dealings with many of the "ousters" of the Narmada project. *See also*, S. Kothari's "Statement," *supra*, and S. Sarangi and R. Billorey, *"The Nightmare Begins: Oustees of the India Sagar Project"* in ECONOMIC AND POLITICAL WEEKLY, April 23, 1988.

76. *See, e.g.*, sources cited *supra* note 74. ILO Convention 107 of 1957 (ratified by many countries) requires recognition of "the collective right of ownership" of indigenous and other distinct ethnic minorities or "peoples" to "lands" which they have "traditionally occupied" under their own customary law (Art. 11) and provides that they "shall not be removed from their habitual territories without their free consent" except for "reasons relating to . . . national economic development," in which case, they must be "provided with lands of quality at least equal to that of the lands previously occupied," plus full compensation for "any resulting loss or injury." Indian NGOs have attempted (so far, without success) to use the ILO enforcement machinery for this Convention to have the ILO declare, in effect, that the procedures for removal, resettlement, and compensation were in violation of the Convention — a position which appears to have been upheld by the Indian Supreme

Sometimes victims of these wrongs search desperately for review and redress. A World Bank project officer reported the anguish and anger of the victims of a dam project in the Philippines: "A whole municipality was going under water. [We] were drowning a whole municipality, even its mayor. . . . They wrote to McNamara, to the Pope, to everybody . . . . There is no doubt that OED [i.e., the project evaluators] will kill us on this one."[77]

Court in another displacement case. *See* H.O. AGARWAL, IMPLEMENTATION OF HUMAN RIGHTS COVENANTS WITH SPECIAL REFERENCE TO INDIA 74 (1983) (citing an unpublished decision and opinion). The ILO is presently redrafting its much-criticized Convention 107 to strengthen the rights of indigenous groups to retain possession of traditional lands. *See* ILO, Partial Revision of the Indigenous and Tribal Populations Convention (No. 107), Report IV, Part 1 of the International Labor Conference, 76th Session (1988). The right of ethnic, religious, and linguistic (not just "indigenous") "minorities" to "enjoy" their "culture" is protected by article 27 of the U.N. Convention on Civil and Political Rights. By virtue of the history and the pluralistic social context of some countries, some of these groups clearly see their long-occupied, group-held ancestral lands as a basic, integral element of their culture, a social fact which is clearly recognized by both scholars and those who are struggling to provide more expansive protections to the cultural rights of distinct peoples. *See infra* note 77 and various essays in THE RIGHTS OF PEOPLES J. Crawford (ed.) (1988) (which also contains a useful bibliography on this subject); S.H. DAVIS, LAND RIGHTS AND INDIGENOUS PEOPLES: THE ROLE OF THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS (1988) and various essays in A. Hansen and A. Oliver-Smith, *supra* note 73.

77. See R. Ayres, Banking on the Poor: The World Bank and World Poverty (1985) at 113.

The following is eloquent testimony illustrating our point:

"Asian Development Bank
Makati, Rizal
Dear Sir:

We, the T'boli people of Lake Sebu, Suraliah, South Cotabato, after hearing about the forthcoming construction of the Lake Sebu Dam and the subsequent damage and destruction it will bring to our homeland, would like to bring to your attention our strongest opposition to this government project. We would like you to consider the following reasons:

1. The proposed dam will flood our most precious land and destroy our food and source of livelihood which we have worked so hard to produce.

2. If this land is flooded and our food supply destroyed, it will certainly kill us and our children. For where shall we go, since our Visayan brothers have already taken the choice lands that God had first given us?

3. This land and these lakes God has given us. We do not want this land to be destroyed by flood, because it is precious to us; our ancestors were born and were buried here. We would rather kill ourselves and our children than to witness the terrible destruction this dam would bring.

4. We have heard that new lands will be set aside for us in distant and foreign places. We would rather be drowned here and be buried with our ancestors than to live far from our homeland.

5. If we lost this agricultural land, no food production will be made, and we can no longer contribute to the national economy.

6. We also have heard that the dam will serve many lowlanders with electric power and irrigation. But, we humbly ask, how will the dam serve and assist we T'boli people?

7. In all this, we have never been directly approached, advised, or informed regarding the planning of the dam. Do we not have rights? Are we not

Reports from groups in India displaced by large-scale dam-building projects have revealed the kinds of serious flaws in the legal regimes and practices which government agencies follow when they purport to provide compensation to families whose lands are expropriated.[78]

> When expropriation is undertaken, governmental bodies charged with implementation often find themselves under heavy pressure to reduce costs and expedite timetables. Usually, there is little effort to investigate and understand the position of occupants and their system of land tenure. Their objections to the project are rarely heard in any formal, arbitral sense; indeed, they are often suppressed. The lands in question, or large portions, may be declared "unoccupied" and "public trust" lands and evictions ordered. Where compensation is promised, the process all too often lacks any system rules essential to assure fair reparation for those convicted. The burden is cast upon occupants to prove the existence of their holdings, and the proof required is difficult, at best, to produce, particularly when officials demand written evidence from illiterate people who speak a different language and hold under customary systems of tenure peculiar to their district. The formulae for determining compensation are set unilaterally. The fund set aside to defray awards is often woefully inadequate to pay for all the costs inflicted. In essence, the process is lawless: the absence of clear, published procedures to protect occupants enables government to run roughshod over them.[79]

> also Filipino citizens capable of planning for our future? We do think that real development has to be realized with the free participation of the common people no matter how poor they are. We have hear that the Asian Development Bank will be funding a major portion of this project. If this be true, we ask only that reconsider the consequences and moral implications involved in this project.
>
> Very sincerely yours,
>
> T'BOLIS OF LAKE SEBU
>
> (This petition was signed by 2,622 T'Bolis of Lake Sebu.)"

P.L. Bennagen, *Philippine Cultural Minorities: Victims as Victors*, in V.R. JOSE, MORTGAGING THE FUTURE: THE WORLD BANK AND IMF IN THE PHILIPPINES (V.R.Jose ed. 1982).

The following is from a petition filed in the Supreme Court of India by two Adivasis — leaders of a group threatened with eviction by a dam project:

> The attempt of the [government] to resort to violence [to prevent protest meetings] . . . smacks of the fact that they [government] consider the tribal communities as secondary citizens and in the way of so-called development. [The government] feels that the tribals are not a part of development of this nation, but a hindrance. The tribals of the area have a deep-rooted culture and economic life associated with land and to tear them off from their land is to separate the blood from their body.

Quoted in S. Kothari, *Ecology v. Development: The struggle for Survival*, DEMBO, *supra* note 5, at 214.

78. The ICLD has an extensive file of materials relating to problems confronting NGO's working with groups of "oustees" and other victims of the Narmada project. The file includes news reports, reports and communications of NGOs and legal activists, and reports of World Bank consultants. These materials were used as a basis for the quote which follows. In January 1988, ICCD helped ICJ organize a workshop of activist groups at Rajpipla where strategies to defend rights of victim groups were discussed. *See supra* note 71.

79. *See* C. Dias and J. Paul, *supra* note 5, at 237. For other material reflecting the

Modernization of Agriculture is an oft-used label for a second, notoriously risk-prone category of projects. They usually entail deliberate, external, often expensive interventions to produce changes in the crops farmers produce and in the organization, methods and technologies of production. The goals of these projects may include: increasing the output of commercial (often export) crops, developing state-fostered agribusinesses, and producing food for government corporations to sell to urban populations. Modernization projects appear in various forms: e.g., the development of plantations or ranches, the introduction of irrigated farming, the conversion of peasants into cash-crop producers through various forms of contracts between producers and those who supply inputs and purchase the crop, and the channeling of resources for research, extension, credit, inputs, feeder roads, and marketing to support these ventures. The promoters of "modernization" projects are often an alliance of local commercial farmers and agribusinesses, parastatal and other government agencies — sometimes all too readily aided and abetted by IDAs.[80] They are usually the primary beneficiaries, but many of the farmers who become the producers for these projects are often victims of risks which have long been well known, widely documented.[81] They include:

> a. *Landlessness.* Modernization often calls for large-scale, capital-intensive farmers. This may be achieved by the extraction of land (through coerced sales or expropriation) from smallholders, by firms (often parastatals) which create plantations. In other project contexts, wealthier, "progressive" farmers may first use various methods (notably moneylending) to gain control over the lands of their marginal neighbors.[82]

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complexity of these problems, *see* C. Escudero, *supra* note 73. Compare, R. Noronha and F.J. Lefham, *Traditional Land Tenure and Land Use Systems in the Design of Agricultural Projects*, WORLD BANK WORKING PAPER No. 511 (1983).

80. The working links between private enterprises and public agencies (notably, state corporations) and IDAS, and the role of private actors in the processes of initiating, planning, and management of projects (or elements of projects) and accountability for outcomes deserve more attention than they have received in this paper, notably, the role often delegated to private firms (often working as joint enterprises with state companies) in IDA-financed "modernization of agriculture projects." For some suggestive studies of joint enterprise agribusiness schemes finances by IDA loans, see, e.g., B. DINHAM AND C. HINES, AGRIBUSINESS IN AFRICA (1984). *Compare*, THE POLITICS OF AGRICULTURE IN TROPICAL AFRICA, (J. Barker ed. 1984). The CDC-financed, Philippines palm oil plantation scheme discussed below is a stark illustration of the need to hold IDAs legally accountable for activities of private firms which receive IDA loans or management contracts.

81. There are a number of highly critical reviews of the World Bank "modernization of agriculture" policies and programs. *See, e.g.*, C. PAYER, THE WORLD BANK: A CRITICAL ANALYSIS (1982); S. GEORGE, ILL FARES THE LAND (1984).

82. *See* C. HEWITT DE ALCANTARA, MODERNIZING MEXICAN AGRICULTURE: SOCIOECONOMIC IMPLICATIONS OF TECHNOLOGICAL CHANGE 1940-1970 (1976). (Impacts of various kinds of projects). On plantations and landlessness, see, A. DUBS. AND C. MOYNIHAN, THE CDC AND MINDINAO: REPORT TO THE PARLIAMENTARY HUMAN RIGHTS GROUP (1983) which is a good case study of the many kinds of harms. Large-scale irrigation schemes pose clear threats of landlessness. *See, e.g.*, IRRIGATION IN TROPICAL AFRICA: PROBLEMS AND PROBLEM SOLVING (W.M. Adams and A.T. Grove eds 1984) (Cambridge African Monographs, No. 3). Escudero,

b. *Indebtedness.* Small farmers drawn into schemes for the production of cash crops, requiring purchase of new seeds, inputs, and other factors from agribusiness, are unusually vulnerable to impoverishing indebtedness which leads to loss of control of lands and income and to malnutrition.[83]

c. *Worker exploitation.* Landless (or land-poor), rural workers are often forced, by circumstances, to become wage-workers for agribusiness. The terms of employment and physical conditions under which they work are often exploitative. Agribusinesses often monopolize both markets for cash crops and the sale of inputs needed to produce new crops.— with the result, again, that producers are exploited.[84]

d. *Loss of market, crop loss, and crop displacement.* There is always the risk, all too frequently realized, that the market for the new "modern" crops (on which producers must now depend for their livelihood) will deteriorate. There is the further risk that new seeds and plant varieties prescribed by "engineers" of development projects will prove vulnerable to local ecological conditions. Seldom are producers insured against these outcomes; yet, they are the primary losers.[85]

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supra note 73 at 18-22, notes that, during 1986 the Bank was supporting at least 15 such projects. The Bank claims to have put into place policies and procedures to secure protections for those subjected to risk; the regional development banks (e.g., the African Development Bank) have none. For studies of some irrigation projects and displacement, see, C. JACKSON, KANO RIVER IRRIGATION PROJECT (1985); P. Clough and G. Williams, *Decoding Berg: The World Bank in Rural Northern Nigeria*,in STATE, OIL, AND AGRICULTURE IN NIGERIA (M. Watts ed. 1987). "Area development" and "integrated rural development" projects have often been designed and managed, albeit unintentionally, to provide resources and services utilized by landlords and affluent farmers to develop new systems of production which lead to evictions of tenants and efforts to gain control of the lands of marginal "small farmers." The history of the Chilalo project in Ethiopia is an instructive case study. *See, e.g.*, J.M. Cohen and N.T. Uphoff, *Rural Development Participation: Concepts and Measures for Project Design and Evaluation*, Cornell University. Rural Development committee Monograph No. 2 (1978). *See generally* Noronha and Lethman, *supra* note 79.

83. *See e.g.*, R.H. Green, *Law, Tradition, Contract, and Impoverishment* (unpublished paper prepared for a 1986 workshop on the effects of "modernization of agriculture," cosponsored by the University of Windsor, Faculty of Law and ICLD) (analyzing the "contract" and other arrangements imposed on farmer producers who were incorporated into various Sahel-region irrigation schemes). *See also*, H. Umehera, *Green Revolution for Whom?* in A SECOND VIEW FROM THE PADDY: MORE EMPIRICAL STUDIES ON PHILIPPINE RICE FARMING, INSTITUTE OF PHILIPPINE CULTURE (A.J. Ledesama ed. 1983). *See generally*, R. CHAMBERS, RURAL DEVELOPMENT: PUTTING THE LAST FIRST (1984), for a vivid view of the problems of credit and debt for marginal rural households.

84. *See* Green, L.P. REYES-MAKIL AND P.M. FERMIN, LANDLESS RURAL WORKERS IN THE PHILIPPINES: A DOCUMENTARY SURVEY (1983); ILO, PROBLEMS OF RURAL WORKERS IN ASIA AND THE PACIFIC (Report III of the ILO Asian Regional Conference of 1980).

85. For a review of these problems and some experience, see C. Dias, *Reaping the Whirlwind: Some Third World Perspectives on the Green Revolution and the Seed Revolution*, in DEMBO, *supra* note 5, at 79-102. For an interesting recognition of these kinds of problems within the context of some major projects, see COTTON DEVELOPMENT PROGRAMS IN BURKINA FASO, COTE D'IVOIRE AND TOGO, A WORLD BANK EVALUATION STUDY (Operations Evaluation Department, World Bank) (1988) (project hurt by 1986 cotton-price drops; problems of setting up a "stabilization fun;" need for farmer participation in its management). On the environmental problems and risks of cotton, see Rich, *supra* note 72, at 698 (decline in yields due to pests; dangerous overuse of insecticides).

> e. *Environmental degradation.* The depletion of soil resources is often the result of mono-cropping and other practices introduced by modernization. Another threat, serious over the long run, is the loss of valuable, genetic resources when traditional plants are replaced by new foreign varieties.[86]
>
> f. *Food shortages, hunger, and disease.* Modernization often means loss of land needed to maintain local self-sufficiency in food production; the result is that economically marginal families become increasingly dependent on other producers and on uncertain markets to purchase food supplies. Irrigation projects often produce dangers of malaria and bilharzia.[87]
>
> g. *Exclusion.* Smallholders, rural workers, and women are regularly excluded from any form of meaningful participation in the planning and management of modernization projects. Denied rights of participation and access to decisionmakers, they are usually unable to secure protections or redress against the wrongs noted above.[88]

A 1983 World Bank report, *Focus on Poverty*, admitted (albeit with little sensitivity to the human rights implications) that these kinds of harms occur. The report (prepared by a blue-ribbon, task force) notes that some "modernization" projects "have made the landless worse off. In some instances, financing for [mechanization] . . . and modern rice mills has reduced employment, thereby adding to rural poverty. Mechanization has also encouraged landlords to evict tenants. In the Muda project, the introduction of combine harvesters also encouraged landlords to evict tenants. . . . In one East African project, inadequate attention to the social and political context helped create a system of absentee landlords. . . . Other projects have ignored the role of women in the production processes . . . and have adversely affected women's income and earning

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86. *See* Rich, *supra* note 72, at 688-703, for an excellent survey of the environmental effects of unsustainable modernization projects, cattle-ranching projects, promotion of chemical-intensive farming, and irrigation. The environmental dangers of these and other kinds of projects is now well recognized. On the introduction of new plants and biotechnologies, see the several papers by D. Dembo, C. Dias, and W. Morehouse *supra* note 5, at 70-142.

87. *See, e.g.*, S. REUTLINGER, THE NUTRITIONAL IMPACT OF AGRICULTURAL PROJECTS IN J.P. GITTINGER, J. LESLIE, AND C. HOISINGTON, FOOD POLICY: INTEGRATING SUPPLY, DISTRIBUTION, AND CONSUMPTION (1987) (a World Bank study). There are many excellent papers in this volume. For analysis of the impact of cotton projects on foodcrop production, see THE WORLD BANK EVALUATION STUDY, *supra* note 85, at 8-9.

88. *See*, THE WORLD BANK'S SUPPORT FOR THE ALLEVIATION OF POVERTY (WORLD BANK, 1988). This is a report which supplements the 1983 report, Focus on Poverty, note 89 *infra*. It is designed to reaffirm the Bank's commitment to alleviation of, especially, rural poverty. The effects of non-participation are noted throughout. The Report candidly admits: "The evidence to date, however, suggests that [intended] beneficiary participation has played a very limited role in implementing Bank-financed rural development projects and virtually no role in designing projects." The exclusion of women from participation, even in "the benefits" of modernization projects has been repeatedly documented, as the above reports note). For an excellent current review of the phenomena, see THE WORLD BANK EVALUATION STUDY OF THE WEST AFRICAN COTTON PROJECTS, *supra* note 85, at 30-38.

capacity."[89]

IDA-financed projects to build dams and promote irrigated farming and commercial agriculture in Northern Nigeria (and elsewhere in SSA) have produced a conversion of small farms into big ones and small farmers into tenants (usually of absentee, often civil-service landlords); displacement of traditional food crops, mechanization and unemployment, and malaria and bilharzia.[90] Some of the dams and irrigation schemes have so reduced the downstream river flow that the fertility of adjacent lands has been destroyed and, thus, the livelihood of downstream farmers who, of course, are uncompensated for their losses.[91]

Irrigated farming projects (to produce cash crops) have been urged as a development strategy in some regions. But experience suggests that these schemes often impose serious risks on the farmer-producers drawn into them. Recent reviews by the Bank of its "irrigation portfolio" reported that "environmental risks are a frequent problem" (e.g., salinization, waterlogging).[92] Often, too, there are health hazards (bilharzia, malaria). In many of these projects, subsistence-peasant families (women and children included) are converted into "tenant" producers of a state company (the operator of the system). The operator of the bureaucracy determines what crops will be grown, what quotas will be set, the provision of supplies and inputs (on credit), allocation of water, and the management of maintenance and repair of the system. Where producers lack full participation in these kinds of decisions as well as in the management of crop-marketing, they are obviously put at risk. The project may even be depicted as a "success" for the government, while producer-tenants are driven into debt and hunger.[93]

IDA financing to support the introduction of plantations is often accompanied by widespread human rights violations. A few years ago, two British MPs (Messrs. Dubs and Moynihan) investigated human rights grievances associated with plantation projects on Mindanao which were financed by the Commonwealth Development Corporation, the CDC. Their report[94] presents a shocking record of land-grabbing through re-

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89. *Focus on Poverty: A Report by a Task Force of the World Bank* 11 (1983).

90. B. Beckman, *Public Investment and Agrarian Transformation in Northern Nigeria*, in STATE, OIL AND AGRICULTURE IN NIGERIA, *supra* note 82.

91. *See* P.G. Pilon and R.A. Bullock, *"Monitoring Land Use Change in the Sokoto-Rima Basin, Nigeria"* (paper presented to the Annual Meeting of Canadian Association of African Studies, Edmonton, 1987) (using a sequence of "before and after" satellite earthscan photos of effects of a dam project shows how downstream farmers were affected by the drying up of the downstream river.)

92. *See* WORLD BANK OPERATIONS EVALUATION DEPARTMENT, RURAL DEVELOPMENT: WORLD BANK EXPERIENCE, 1965-86, at 44. (Hereafter cited as OED Rural Development Report 98).

93. *See* R.H. Green, *supra* note 83.

94. A. Dubs and C. Moynihan, *The CDC and Mindanao* (Report to the Parliamentary Human Rights Group 1983) (this was a bipartisan report). *See also*, C. Espiritu, *Transnational Agriculture and Philippine Agriculture: The Philippine Experience*, in DEMBO,

course to murder and other violence, displacement and conversion of peasants into landless workers, depletion of local food sources, corrupt and exploitative employment practices coupled with patently illegal efforts to frustrate formations of unions and collective bargaining. It seems almost incredible that an international agency could allow its funds to be used for a project which, at the outset, contained high risks that these very wrongs would occur. The reason, of course, is clear. The CDC, along with its partners (a TNC and a Philippine state corporation),[95] simply failed to recognize the risks to people inherent in plantation projects; they failed to impose protections of rights and promotion of participation as part of the law of the project; they produced a lawless project (e.g., in the loan agreements); and, to this date, no agency has been held legally accountable to the victims for the dreadful consequences. The Dubs-Moynihan report, one might add, is simply a meticulously documented history of phenomena which commonly occur when IDAs promote large-scale agriculture.[96]

Perhaps the CDC, World Bank and other IDAs are now far more aware of the consequences of high-risk projects of the kind described above. Certainly (as the Bank's own publications now reveal)[97] many hard lessons have been taught. The task is to act on these lessons. The following are some suggestive propositions:

(1) The full range of harms to people, the social costs of "modernization" and "large-scale infrastructure" projects, can never be adequately estimated without first enlisting the meaningful participation of all categories of project-affected people.

(2) Unless all of these potential harms and costs are assessed, it is hardly possible to determine whether the project is justified in spite of its cost.

(3) Criteria must be developed to determine when such projects are justified; the ultimate determination must entail a legal judgment based, of course, on a showing that economic and other social evidence support the criteria for justification. Projects which inflict irreparable harms (eco-

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supra note 5, at 41-68.

95. IDAs, particularly some kinds of IDAs (e.g., the CDC, the International Finance Corporation of the World Bank group, and, at times, the IBRD itself), have wanted to work with state corporations. Indeed, the Bank has encouraged borrower governments to create autonomous agencies as vehicles to receive funds and "implement" projects. A.A. Fatourous, *The World Bank*, THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON LEGAL AND INSTITUTIONAL CHANGE IN DEVELOPING COUNTRIES, 52-61 (J. Howard ed. 1977). State corporations and agencies garbed in similar legal clothes are notoriously unaccountable. *See, e.g.*, Y. Ghai, *Law and Public Enterprise*, in V.V. RAHANDHAM, PUBLIC ENTERPRISE IN THE DEVELOPING WORLD (1984). This is probably particularly true in relation to state enterprises in the agricultural sector.

96. *See supra* note 82 and *infra* note 94.

97. *See, e.g.*, M. Cernea, and C. Escudero *supra* note 73. *See also* the semiofficial descriptions of Bank policies BAUM AND TOLBERT, *supra* note 1, at 471 (need for careful "social analysis" of projects).

nomic, social, environmental and cultural) on distinct and large groups of the population, should be deemed illegal *per se*.

(4) The burden of justification of all risk-prone projects must always lie with the promoters of the project.

(5) Those whose rights are threatened must enjoy full rights and legal resources enabling them to dispute the legality of proposed projects.

(6) Such projects should never go forward unless and until procedures are put into place which assure that those threatened with harm will be fairly compensated for all losses and that those displaced will be resettled in situations which provide new opportunities for sustainable development; resettlement projects must be seen as people-centered, "development" projects, not as dumping grounds.

(7) Law must be put into place to secure these kinds of objectives.

(8) IDAs must be independently satisfied that these requirements are met; they cannot absolve themselves of that responsibility by delegating it to other agencies.

Some of these propositions are reflected in new (or suggested) guidelines recently developed within the World Bank in response to harsh lessons of experience.[98] All of them suggest questions which lawyers must confront if the human rights of the victims of "development" projects are finally to be taken seriously.

Poverty and People-Centered Development Projects: The Need to Promote Rights

Over 15 years ago, Robert McNamara delivered his stirring Nairobi speech describing the worsening conditions of the Third World poor, pledging the Bank's help to relieve them.[99] In 1976, the international community formally endorsed this commitment in the carefully orchestrated, much publicized resolution of the ILO-sponsored World Employment Congress which declared that "meeting the basic needs of the poor" (notably rural poor) should take priority in international development assistance.[100]

Addressing the "basic needs" of impoverished rural communities through development projects is no easy task, as a decade of checkered experience now teaches.[101] In the first place, the social and physical environments of rural poverty vary significantly. They may be characterized by harsh or uncertain climatic conditions, by marginal, fragile soil fertil-

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98. *Id.*

99. President's Address to the Board of Governors, Nairobi, September 1973. For the history of this interesting period in the Bank, see, e.g., Ayres, *supra* note 77. For a review of the many difficulties encountered, see OED Rural Development Report, *supra* note 92.

100. *See International Labor Organization, Meeting Basic Needs: Strategies for Eradicating Mass Poverty and Unemployment.* Conclusions of the World Employment Conference of 1976 (ILO, 1976).

101. *See* Ayres, *supra* note 72, and sources cited *infra* note 102.

ity, by deteriorating environments, by historic lack of infrastructure and services and by official neglect and disinterest. They are often characterized by social relations which maintain stratification, segmentation, dependency, civic ignorance, and impoverishment by systems of land tenure, credit, employment, trade and local politics controlled by some combination of elites or dominant classes. Thus, the tasks of "people-centered" rural development are often profoundly difficult. They may be addressed to finding ways to help smallholders improve production of cash crops. But, local agronomy, land tenancy, credit relations, household and labor cycles and needs for improved staple food production can hardly be ignored. They may be addressed to rehabilitating and protecting lands from deforestation, overgrazing, or other uses, but, again, the needs of people for food, fuel, and water and, above all, the need to enlist full, local support for any land use controls to be put into place must be addressed. There may be urgent needs to improve local services, but then the problems of creating and maintaining effective local administration and official commitment regularly become apparent. The introduction of new, cash crops may be proposed, but then the land tenure system, problems of credit and indebtedness, gender roles, and community power relations need to be understood. These, of course, are only illustrative examples.[102]

Rural development programs can hardly be initiated overnight. Indeed, it takes years to negotiate, plan and "implement" them and then many more months to "evaluate" the results[103] (an exercise which becomes arcane if purely economic criteria are used and more problematic if simplistic social criteria are used).[104] It is doubtful, for example, that the "benefits" of a project can be sustained unless the intended beneficiaries have not only realized tangible gains, but have somehow become more able to exercise greater power over the future "development" of their community; but that was not so readily apparent to the official in IDAs and governments who were charged in the 1970s, through the ringing rhetoric of resolutions, plans, and speeches, with the job of doing rural

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102. *See* OED, RURAL DEVELOPMENT REPORT, *supra* note 92. Michael Cernea's project to survey the Bank's experiences with many types of projects in many areas is a most instructive contribution towards providing some understanding of these problems. *See* PUTTING PEOPLE FIRST: SOCIOLOGICAL VARIABLES IN RURAL DEVELOPMENT, (Cernea ed. 1985). Goran Hyden's *No Shortcuts to Progress: African Development Management in Perspective* (1983) (and many of Hyden's later papers) contain highly regarded, instructive insights on the difficulties experienced by African projects. *See also*, IMPLEMENTING RURAL DEVELOPMENT PROJECTS: LESSONS FROM AID AND WORLD BANK EXPERIENCE (E.R. Morss and D.D. Gow eds. 1985) (Reports on three-year evaluation study of administration of AID and Bank projects).

103. *See* OED, RURAL DEVELOPMENT REPORT, *Id.* (reviewing a number of projects over the past 15 years).

104. *See* Baum and Tolbert, *supra* note 1, at 419-445, for a guide (by two senior bank officials) for laypeople into the economic analysis (costs and benefits to borrower) or projects, and *Id.* at 449-466 for the financial analysis (costs and returns to the lender).

development.[105]

Indeed, it seems probable that many of these crucial actors (e.g., officials and "experts" in the Bank who did project work and their counterparts in host-government ministries) were neither enthusiastic nor well equipped to design projects to "meet the basic needs" of the rural poor.[106] Most projects proved more difficult than anticipated. All too often they were less than successful and often harmful enough in their impacts on at least some groups (notably women) in "target communities." That is, the teaching of a large literature, including the literature of IDAs themselves, notably that of the Bank, which, on this score, is often (not always) rather candid about the results of its labors.[107]

The reasons for failures are, of course, rooted in many systemic problems and practices. But some themes stand out. It is repeatedly reported that projects are designed on flawed and inadequate knowledge bases, like, an inadequate understanding of soil and climate phenomena, or farmers practicing "traditional" farming methods. Lack of understanding of household farming systems and labor cycles and gender roles and "rights" in relation to crops; lack of understanding of local land tenure and power relationships; local experience with official (state-regulated) cooperatives; lack of knowledge of ethnic cleavages, or of political concerns and ignorance of many other phenomenon evidence a poor project design. Often, it seems apparent that some "target" peoples (e.g., the poorest farmers) never understood the goals of projects and, for various reasons (e.g., lack of consultation and confidence in government officials, fear of losing ground in their crucial struggles to "survive" through traditional farming), never cooperated in project activities (e.g., by refusing to adopt proposed new crops, inputs, or production methods).[108] Women, as both farmers and providers of essential household services, were regularly ignored and often excluded from participation in cash-crop schemes, cooperatives, and the planning of community facilities.[109]

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105. *See Id.* at 469-471 (discussing Bank's recently recognized need for "social analysis" of proposed projects). *Cf.*, Operations Evaluation Department, Project Performance Results for 1986 36 (World Bank, 1988) (reporting evaluations of 52 "implemented" projects: "The relative economic success of these projects does not necessarily mean that they have been successful in reaching target poverty groups."

106. *See* Ayres, *supra* note 77 (chapter 9).

107. *See e.g.*, THE WORLD BANK'S SUPPORT FOR THE ALLEVIATION OF POVERTY (WORLD BANK, 1988) (contains a summary review of difficulties experienced by projects in various sectors).

108. *See, e.g.*, the case studies reported in Cernea, *supra* note 25. For an elaborate study of poor-people perspective and the types of problems they encounter as project-affected people, see R. CHAMBERS, RURAL DEVELOPMENT: PUTTING THE LAST FIRST (1984). Compare, I. IMAN, PEASANT PERCEPTIONS: FAMINE IN D.C. KORLEN AND R. KLAUSS. PEOPLE-CENTERED DEVELOPMENT: CONTRIBUTIONS TOWARD THEORY AND PLANNING FRAMEWORKS (1984).

109. A theme readily acknowledged in the World Bank report, FOCUS ON POVERTY (1983), see *supra* note 89, and the 1988 supplement *supra* note 107 and a theme which regularly recurs in project evaluations. *See also*, OED, REPORT ON PROJECT PERFORMANCE,

The processes of administering projects have regularly been flawed. Administration in Third World countries tends to be centralized, hierarchical, and stratified. Incentives, like opportunities for the promotion of key lower-level people, are often weak, and so are incentives for upper-level staff posted to the more remote countryside. Social gaps, indifference, and often distrust or disdain characterize relations between officials and poor people. Structures for imposing accountability are weak at best and opportunities for corruption are strong. Higher officials are wary of raising community expectations and of creating more politically active constituencies. The processes for monitoring the programs of projects and regulating or reforming their management are also weak, and they rarely entail much independent participation from intended beneficiaries.[110]

These are some of the findings and problems common to the enterprise of world development which repeatedly appear in studies of projects. The pathologies combine not only to frustrate the achievement of goals, but all to often they end up inflicting harms, skewing distribution of benefits, and creating a lack of sustainable services, increased dependence of the rural poor on the state or local elites, and cynicism and apathy.[111]

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supra note 105 ("Little or no attention is usually given" to the "role" of women of the "effects" of projects on women.

110. There is an extensive literature on these problems, including many World Bank publications. The World Bank Development Report 1983 (World Bank, 1983) contains an elaborate review. An excellent critique of project design, management, and accountability methods — and the underlying assumptions and norms of project decision-takers is set out in R.C.J. LACROIX, INTEGRATED RURAL DEVELOPMENT IN LABOR AMERICA. World Bank Staff Working Paper, No. 716 (1985). For a general critique of national legal regimes governing the administration of projects and delivery of services and resources in rural areas, see J.C.N. PAUL AND C.J. DIAS, STAGE-MANAGED DEVELOPMENT: A LEGAL CRITIQUE, THIRD WORLD LEGAL STUDIES, 1982; LAW IN ALTERNATIVE STRATEGIES OF DEVELOPMENT 35-58 (1982).

111. *See* Ayres, *supra* note 77, at 137-442, for a discussion of these kinds of problems in the context of various types of projects. It is well known, but perhaps often overlooked, that rural communities which appear to be "poor" are frequently (despite physical appearance) socially stratified and sometimes segmented into different socio-economic groups reflecting differences in power and access. As long ago as 1975, this was recognized in the World Bank's still-important Rural Development Sector Policy Paper (World Bank, 1975). A well known passage (p 21) declared:

> In most cases, the poor are found living alongside the prosperous. They sometimes suffer from limited access to natural resources, but, more frequently, they suffer because they have little access to technology and services. . . . In many cases, vested interests operate to ensure not only that the benefits of productive activity are distributed inequitably, but that the poor are denied access to the inputs, services, and organization which would allow them to increase their productivity. Thus, the socioeconomic system operating in the rural areas is often hostile to the objectives of rural development, serving to reinforce rural poverty and to frustrate the efforts of the poor to move up.

For discussion of the legal implications, see C.J. Dias and J.C.N Paul, *Lawyers in Development and Underdevelopment* in C.J. DIAS, LAWYERS IN THE THIRD WORLD: COMPARATIVE AND DEVELOPMENTAL PERSPECTIVES 349-354 (1981).

Of course, it is often extremely difficult to "reach" and organize the "poorest of the

Notable in much of this literature is the absence of efforts to enable meaningful participation by those designated as "targets" or "clients" of proposed development strategies at the crucial phases of design and planning. Rarely does one read a study reflecting any systematic effort by project designers to generate genuine, free, grassroots dialogue and use that dialogue as a means to generate knowledge of the needs, grievances and proposals of the rural poor; their perceptions of what should and can be done. Notable, too, is the absence of much development-focused literature which takes seriously the fact that the rural poor have rights to engage in that kind of dialogue.

Of course, there is no claim here that the rural poor, by dint of experiencing their poverty, know all that needs to be known to define their problems and the solutions to them. Rather, the claim is that the development of full understanding of these problems, and of effective measures to address them, can only come through a sharing of knowledge which generates a new knowledge. That knowledge can only be created through multilateral, interactive dialogue among all concerned. Problems must first be conceptualized; there must be a *shared* understanding of the conditions and needs to be addressed. Then, the measures adopted must be understood, supported, and, indeed, often implemented by those primarily concerned.[112]

Unless rural people are provided with both incentives and means to make changes which *they* identify as necessary, it is doubtful that development projects initiated from the outside can achieve the results desired by the initiators. These lessons have been writ largely in scores of reports, but they are hard to learn because the agencies which design and manage

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poor" and, often, women in many communities. *See* M. Lipton, *The Poor and the Poorest* (World Bank Discussion Paper No. 25) (World Bank 1988). The role of NGOs in helping to catalyze and organize participation by these groups in rural development projects is probably crucial. *See infra* note 112. *See also*, D.D. Gow and J. Van Sant, *"Decentralization and Participation: Concepts in Need of Implementation Strategies"* in MORSS AND GOW, *supra* note 102, at 107-147.

112. "Indigenous knowledge" — e.g., of local agronomy, labor requirements, land tenure problems and other subjects is often extensive, but it may not be reduced into a systematic form which makes its readily available to outsiders. It must be generated by participatory processes. *See, e.g., Indigenous Knowledge Systems Development* (D.W. Broshenka ed. 1986). Similarly, rural poor people may be able to provide indispensable knowledge of their needs," but that knowledge must be discovered through interaction. *See, e.g.*, Chamber, *supra* note 83. On these processes, see, Md. A. Rahman, *A Methodology of Research with the Rural Poor*, published in UNICEF's journal, Assignment Children, No. 41 (1978) and also Rahman and Sarilakus: *A Pilot Project for Stimulating Grassroots Participation in the Philippines* (ILO Technical Cooperation Evaluation Report. Rural Employment Policies Branch, Employment, and Development Dept (ILP, 1983). For a World Bank study of a foundation-funded project thought to embody these kinds of grassroots participatory development of project goals and strategies — i.e., stimulating the community to work out a series of interrelated project activities, see WORLD BANK OPERATIONS EVALUATION STUDY, THE AGA KHAN RURAL SUPPORT PROGRAM: AN EVALUATION (WORLD BANK, 1987). COMPARE, A.D. HISCHMAN, GETTING AHEAD COLLECTIVELY: GRASS ROOTS EXPERIENCES IN LATIN AMERICA (1984).

projects lack procedures and law mandating self-reliant participation by the rural poor.[113]

Just as the exercise of rights and participation are essential in understanding problems to be addressed, so they are usually essential in all later stages of the project. Once again, evaluation studies and case histories sponsored by IDAs makes a compelling case. Thus, a Bank-sponsored study of rural-roads projects documents the need for participation in planning, in mobilizing local labor and technologies, in providing for maintenance and in providing against the risk of landgrabbing by elites. "Strengthening the legal structures" that enable "participatory projects" was the central lesson but, unfortunately, these "legal structures" are seldom put into place.[114] A number of studies of credit for the rural poor document the need to work through endogenous, self-managed organizations of "intended beneficiaries" in order to avoid elite domination and develop understanding and enforcement of rules which will make the project sustainable.[115] The food implications of many agricultural projects (e.g., those which introduce new crops or affect existing labor cycles) can only be understood and mitigated through participatory research and action.[116] A World Bank report on the need to develop agricultural research for women farmers underscores the need for similar measures.[117] Other studies dealing with problems related to the creation of wells and pumps to provide potable water supplies for poor communities urges the need to develop self-managed community services through participatory processes.[118]

A Bank study concerned with strategies to confront environmental degradation and decertification in Africa emphasizes the need for a myriad of micro, "grassroots" projects concerned both with regulating land

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113. *See, e.g.*, the quote from Cernea, *infra* note 120, summarizing case studies.

114. *See, e.g.*, C. Cook, *et al.*, *Institutional Considerations in Rural Roads Projects, World Bank Staff* Working Paper No. 748 (1985).

115. *See, e.g.*, INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT (IFAD), THE POOR ARE BANKABLE: RURAL CREDIT THE IFAD WAY (IFAD 1988); IFAD, THE ROLE OF RURAL CREDIT PROJECTS IN READING THE POOR. IFAD'S SPECIAL STUDIES SERIES (1985); D.K. Leonard, *Putting the Farmer in Control: Agricultural Institutions in Strategies for African Development* 191-196 (R.J. Berg and J.S. Whitaker eds. 1986); S. DUMOUCHEL AND N. THEDE, WOMEN SAVINGS AND CREDIT IN THE SAHEL: TOWARDS INDEPENDENT DEVELOPMENT. A REPORT OF SOLIDARITY CANADA-SAHEL. (Study financed by CIDA, 1987); J.M. Lieberson, *A Synthesis of AID Experiences: Small Farmer Credit 1973-1985* (AID Evaluation Special Study No. 41, 1985).

116. *See, e.g.*, S. REUTLINGER, *supra* note 87. (World Bank expert outlines various kinds of adverse food and nutrition impacts to be ascertained in advance; plain implication is that the necessary knowledge can only be generated by participatory processes.) *See* C.J. DIAS AND J.C.N. PAUL, *Developing the Human Right to Food as a Legal Resource for the Rural Poor: Some Strategies for NGOs* in THE RIGHT TO FOOD (P. Alston and K. Tomasevski eds. 1984).

117. *See, e.g.*, J. Jiggins, *Gender-Related Impacts and the Work of International Agricultural Research Centers*. CGIAR Study Paper No. 17 (published by World Bank, 1986).

118. *See, e.g.*, J. Briscoe and D. deFerranti, *Water for Rural Communities: Helping Poor People Help Themselves* (World Bank, 1988).

uses and promoting rehabilitation projects. The only viable approach is to help communities understand the forces contributing to the degradation and ultimate destruction of environments and to help them identify steps which can be taken to halt and reverse the processes. In this approach, participatory community structures become the critical agencies to design and implement projects and empower the critical strategy. "Laws concerning social organization should be examined to . . . reduce barriers to the setting up and recognition of *genuine* grassroots organizations empowered to make and enforce rules, raise revenue [and engage in] collective resource management."[119]

Dr. Michael Cernea has been retained by the World Bank to study needs and strategies for participation. With a number of other colleagues, he has reviewed in detail many case histories of projects reflecting a broad spectrum of Bank activities including roadbuilding, resettlement, forestry, aid for small fishermen, and others. He concludes that the only way to make these (and most other) rural development projects successful and sustainable is to "put people first" *in every stage of the project cycle.* That means "empowering people to mobilize their own capacities . . . manage resources, make decisions, and *control activities that affect their lives.* What actually happens when people do *not* come first has been shown convincingly by analysis of many development programs."[120] Another Bank specialist has confirmed this doctrine. Indeed, the problem is not whether to promote participation, but how to develop procedural guidelines which can be adapted to different settings in order to produce the elements of community empowerment which enables participation.[121]

International development agencies are usually in a position to promote popular participation. They initiate their own studies and other activities leading to the conceptualization and design of projects. They extend loans through elaborate agreements which may be the product of much negotiation. But local people are never made parties to these negotiations. IDAs often help to design the management of projects and monitor implementation of them, and they often conduct their own extensive evaluations. But project-affected people have little input into these processes. Though the evaluators often expound the rhetoric of "participation;" they repeatedly find that projects have been flawed, because it was lacking. The practice of participation remains an elusive goal.

Failure to provide for participation leads to the tragedies of failure to calculate all the human costs of projects, failure to reduce the risks inherent in the projects and failure to compensate victims fully and fairly. Lack of participation also leads to failure to develop alternative, local, self-managed structures as vehicles for administering many kinds of rural

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119. *See* J. Gorse and D. Steeds, *Decertification in the Sahelian and Sudanian Zone of West Africa* (World Bank Technical Paper No. 61, 1987).

120. Cernea, *supra* note 25, at 13 (emphasis added).

121. S. Paul, *Community Participation in Development Projects: The World Bank Experience*, World Bank Discussion Paper (1987).

development projects, and the absence of these structures prevents effective administration of the project. The economic losses imposed on the poor as a result of denial of rights of participation are often serious enough. Perhaps even more serious, over the long haul, is the continuous fostering of governmental lawlessness and lack of accountability; the undermining of basic conditions necessary to promote an understanding, assertion, and exercise of other basic human rights of the rural poor throughout the Third World.[122]

PART III
DEVELOPING LAW GOVERNING THE HUMAN RIGHTS OBLIGATIONS OF IDAs

Over the past two decades, the IDAs have broadened their official concept of "development" and their roles in promoting "it."[123] Many have recently avowed their intention to address environmental concerns, the needs of women, human rights, and the promotion of local "participation." Special offices have been established within IDAs and "experts" recruited to promote these objectives.[124]

Experience suggests however, that in large, "professionalized" and

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122. For discussions of these empowerment themes from a variety of "development" perspectives, see, PEOPLE-CENTERED DEVELOPMENT: CONTRIBUTIONS TOWARDS THEORY AND PLANNING FRAMEWORKS (D.C. Korten and R. Klauss eds. 1986). *See also*, G. GRAN, DEVELOPMENT BY PEOPLE: CITIZEN CONSTRUCTION OF A JUST WORLD (1983) (contains extensive bibliography of material relevant to this approach).

123. For some significant illustrations, see, R.S. McNamara, *Address to the Board of Governors* (Nairobi, 1973) (signaling a fundamental shift in Bank efforts towards poverty alleviation, with special emphasis on rural poverty) the 1975 Dag Hammarskjold Foundation Report entitled *What Now: Another Development?* published in Development Dialogue Nos. 1 and 2, 1975, (and succeeding issues of that journal dealing with "Another Development" approaches during the 1970s) (influential among Scandinavia IDAs); the ILO, *"Basic Needs" Report of 1976, supra* note 20 (signaling an international consensus favoring basic needs approaches); the *"Alma Ata Report,"* Report of the International Conference on Primary Health Care, Alma Ata, USSR, September 1978) (Geneva, World Health Organization, 1978) (prescribing new, community-based strategies, again, very influential, at least in normative terms); the 1979 FAO World Congress Report on *"Agrarian Reform and Rural Development," supra* note 21; the various conferences on Women in Development, e.g., *Report of the World Conference of the United Nations Decade for Women: Equality, Development, and Peace*, Copenhagen, 14-30 July, 1980. U.N. Doc. A/Conf. 99/35. *See also*, E.R. MORSS AND V.A. MORSS, U.S. FOREIGN AID: AN ASSESSMENT OF NEW AND TRADITIONAL STRATEGIES (1982) (changes in U.S. aid priorities; the "New Directions" policies of the late 1970s). For a general discussion of these trends, see J.A. MATHIESON, BASIC NEEDS ND THE NEW INTERNATIONAL ECONOMIC ORDER" AN OPENING FOR NORTH-SOUTH COLLABORATION IN THE 1980s (1981).

124. It is common for a large organization, e.g., AID, various U.N. organizations and the World Bank, to recognize a neglected problem by creating a new, advisory office to make studies and formulate policies to deal with the concern. When nothing else happens within the agency, that is, in the internal law governing the duties and accountability of the inevitably segmented units which operate according to well established procedures, the efforts of the new office are likely to be marginal. J. Horberry, *The Accountability of Development Assistance Agencies: The Case of Environmental Policy*, 12 ECOLOGY L.Q. 817 (1985).

compartmentalized organizations, there are often significant delays between announced changes in policy and actual changes in performance. As well, it is often very difficult to formulate internal procedures to implement new goals. Scholars who have studied the problems encountered in attempts to change the orientation and practices of large, multi-purpose IDAs seem to suggest the need to develop three kinds of reform-oriented activities:[125] 1) education and research; 2) new standards, processes and accountability systems and 3) external pressures.

A. *Education and research* are independent starting points. Experience suggests lack of serious attention has been devoted, within many IDAs, to the implications of human rights law and particularly to the impacts of project activities on the basic rights of those people directly affected. Lawyers probably paid little attention to the task of protecting rights through agency rules and procedures. Little attention is also paid by "experts" and scholars or even members of the international human rights community. It is hardly surprising that project planners, managers, and evaluators have shown so little sensitivity to rights issues, even when these are obviously raised by the reports they prepare.

Today, the leaders of most IDAs would probably recognize, at least at some abstract level, an agency obligation to protect and promote rights. The real task is for agency staff to learn how to translate that obligation into new practices. One obvious way to do this is to review the rights implications of different kinds of projects which typify agency experience. A good place to begin would be the examination of those kinds which are more obviously "risk-prone." Just as agency staff who work on dam or other large-scale infrastructure projects must, *as a matter of professional competence*, learn about the environmental consequences of such programs, so they *must* know about human rights law to be able to inform themselves about the rights implications of the physical and social changes they propose. The World Bank staff studies by Carlos Escudero[126] (dealing with landholders' rights) and Michael Cernea (dealing with the rights of those involuntarily resettled)[127] are illustrations of the kinds of project-oriented human rights knowledge which can be generated within agencies. But others are urgently needed, notably studies which focus on ways to provide participation and due process at a much earlier point in time in a project cycle, so that, before any detailed planning goes forward, the people whose rights are put at risk may challenge the very legality of the proposal in accordance with procedures and standards previously suggested. They have fundamental rights to do so.

The rights implication of all kinds of projects should be examined. What, for example, are the implications of a project to train community

125. Some of these problems are reviewed in Morss and Gow, *supra* note 73, in studies which tie them to the literature of administration and organization theory.

126. *See* Escudero, *supra* note 73.

127. *See* Cernea, *supra* note 73.

development workers in Honduras?[128] Or, to introduce new varieties of rice, requiring more expensive inputs, into a Philippine village?[129] Or, to introduce new technologies and new forms of marketing into a "small fisherman" community?[130] The World Bank's constant lament, that its project planners, managers, and minorities constantly discriminate against women by ignoring them,[131] is a confession that these staff people are ignorant of both their legal obligation in regard to the *rights* of women and ways to assure their promotion as well as protection.

B. Standards, Processes, and Accountability. Studies of the kind suggested enable a second approach: the development of agency law. This law could be developed through external legislation or, more importantly, internal codes governing responsible staff. This "agency law" would spell out the agency's commitments to human rights and establish mandatory standards and procedures by which to achieve them.

The World Bank's recent statement on "Environmental Policies and Procedures" may provide a suggestive, though incomplete, analogue.[132] In these documents, the Bank first showed the linkage between environmental protection and sustainable development. The report then identified the broad spectrum of harms produced by different kinds of development activities, noting that "projects in most sectors" have "significant environmental implications." It is argued that this proposition is equally valid when applied to human rights. The statement further noted that the damage done by environmental "wrongs" (and consequently similar to the harms caused by human rights violations) may not be immediately apparent, for planners must focus on long, as well as short-term, outcomes.

The bank's statement then proposes various principles and guidelines to govern all Bank project operations at all stages of the project cycle. These require, *inter alia*, country-oriented, sectoral studies of environmental concerns and the development of an "environmental component"

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128. *See* Ayres, *supra* note 71, at 225. Ayres suggests that this rural education project, (in Honduras, at that time) would "have about as much larger meaning as . . . a poverty-oriented project in some favored ward of Mayor Daley's Chicago. . . ." In fact, depending on various factors, such a project could (a) have a decidedly adverse impact on the exercise of rights by the rural poor, or (b) it could be designed to enhance capacities of different groups in rural communities to participate and to assert their rights in relation to projects.

129. *See, e.g.*, A.J. LEDESMA, SECOND VIEW FROM THE PADDY (Institute of Philippine Culture, 1983). (Empirical studies of impacts of introduction of new technologies, seeds, and other changes into rice-farming villages in various regions.

130. *See* R. Pollnac, SOCIAL AND CULTURAL CONSIDERATIONS IN SMALL-SCALE FISHERIES DEVELOPMENT, in World Bank Technical Paper, *supra* note 73.

131. *See supra* note 109. *Compare*, I PALMER, THE IMPACT OF AGRARIAN REFORM ON WOMEN (1985).

132. *See* WORLD BANK ENVIRONMENT AND DEVELOPMENT: IMPLEMENTING THE WORLD BANK'S NEW POLICIES, ENVIRONMENTAL DEPARTMENT POLICY COMMITTEE (1988). For the original policies and processes, see Environmental Policies and Procedures of the World Bank. (Office of Environmental and Scientific Affairs, Projects Policy Department World Bank. May 1984); *see also* Baum and Tolbert, *supra* note 1, at 521-539; Rich, *supra* note 72.

for every project. This component must, through appropriate processes, identify and then spell out the steps to be taken to secure rehabilitation and the protection of environments from the consequences of a wide variety of harmful practices. The development of the "environmental component" is seen as a continuing process, from the initiation stages to "post-audit." A supervisory office (of unspecified strength) is charged with these responsibilities.

A human rights approach follows from the above. Internal agency law must: (1) lay down human rights policies and guidelines, (2) mandate operating principles to apply these policies and guidelines to the particular needs of each project and (3) develop a corpus of "project-specific law" for each undertaking. The task of generating a human rights component to the law governing each project must be seen as a continuing process.

The starting point should be the use of participatory, action-oriented research efforts to help mobilize groups of affected people and to generate knowledge of their perceptions of their interests in relation to the proposed project and to generate knowledge of their rights in relation to those needs in reporting on various studies of ways to mobilize rural participation, Mr. Anisur Rahman of the ILO has shown how the creation of this functional kind of legal knowledge within groups can significantly influence the dynamics of their participation. Participation "empowers" people psychologically by helping them understand the legitimacy of their role and their claims. It helps them focus on concrete problems and specific, community-based strategies to address them. As well, participation enhances group capacity to deal with outside agencies. All of these kinds of changes which must be promoted by development agencies must happen, if the process of creating specific rights law is to move forward.[133]

Numerous studies, including many important IDA reports, attest to the critical role which appropriate, outside NGOs can play in helping to catalyze grassroots groups and center attention on problems to be addressed.[134] It seems clear, though perhaps quite controversial in some countries, that there must at the outset be recognition of rights of NGOs to operate as catalysts, to help communities engage effectively in "participation." The rights of these NGOs are an inherent component of rights of community participation. They are guaranteed as a necessary corollary of ILO rural workers' conventions guaranteeing rights of association at grass roots levels.[135]

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133. Md. A. Rahman, "The Roles and Significance of Participatory Organizations of the Poor in Alternative Strategies of Development." (To be published in the 1987 volume of Third World Legal Studies).

134. *See, e.g.*, M. CERNEA, NONGOVERNMENTAL ORGANIZATIONS AND LOCAL DEVELOPMENT. (Paper presented at International Symposium on Social Development, Yokohama, March 1988). For its influence within the World Bank, see THE WORLD BANK'S SUPPORT FOR THE ALLEVIATION OF POVERTY, *supra* note 107, at 27-28.

135. On this argument, see J.C.N. Paul and C.J. Dias, ALTERNATIVE DEVELOPMENT: A LEGAL PROSPECTUS, THIRD WORLD LEGAL STUDIES, 1982: LAW IN ALTERNATIVE STRATEGIES OF

The tasks of including participation in the design of projects is, perhaps, the crucial stage of developing a dynamic body of project-specific, human rights law. The Bank's environmental statement suggests how this law can be formalized: as the project plan takes shape, so, too, will steps be taken to promote and protect environmental interests. When these measures are understood, the Bank will then insist on "covenants" with borrowers as well as administrative rules and legislative changes, if necessary to assure achievement of measures agreed upon. Ordinarily, all this "law of the project" must be put into place before loan agreements are sent to directors for approval.[136]

Of course, development of these kinds of processes may entail controversial changes in practices long followed by IDAs and governments with which they deal. A policy of informing project-affected people at all stages must replace customs enjoining pervasive secrecy. Encouragement of grassroots mobilization must replace practices of repression or manipulation. The role of outside NGOs working with and for the rural poor must be respected rather than suspected. The need to help project-affected people secure legal resources must be appreciated. Access to decisionmakers must replace exclusion. Conflict must be expected. Negotiation must be the norm. IDAs must play new, proactive roles in promoting these kinds of changes and in making sure that they are confirmed in agreements constituting the law of the project.

Further, it should be recognized that additional, stringent requirements must be established to govern "high-risk" projects, i.e. those projects which will cause widespread displacement or other foreseeable damage to many people. The issues to be confronted here have already been suggested. Certainly, no project of this sort should ever go forward until the full range of human costs, the damages, have been calculated and measures put into place to assure full and prompt compensation. But experience suggests that, where projects are fraught with these risks, it may be impossible to secure adequate redress to victims. A heavy burden should lie with the promoters of such undertakings. The IDAs have the obligation to judge along with the full participation of endangered people when the price of "progress" is too high.

Obligations to protect and promote rights are non-delegable. These obligations cannot be absolved simply by asking for promises from other official agencies of host governments or private actors such as corporations which participate in agricultural "modernization" projects.[137] The actual operations of these agencies must be monitored to assure compliance with rights requirements previously fixed.

Finally, structures must be put into place to secure accountability to agency law. Perhaps a proactive "human rights ombudsman" should be

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RURAL DEVELOPMENT 289, *et seq* (1983).

136. *See* Baum and Tolbert, *supra* note 1.

137. *See supra* note 95.

established. Perhaps agencies and agency officials should reconsider their immunity from tort liability to the victims of rights abuses caused in part by agency neglect.[138] Perhaps penalties of various sorts should be explicit. As one scholar of the pathologies of large-scale aid organizations has put it: "an agency's accountability system shapes the incentives and penalties facing staff members responsible for the implementation of [new] development policies."[139] Thus, developing accountability is of the essence.

C. External pressure. The "incentives" for implementation of new obligations and policies can obviously be sharpened if concerned groups and their surrogates are able to play a more vigorous role in monitoring agency activities.

Until recently, very few NGOs have been positioned to play these roles. But the environmental crises precipitated by a number of large projects has led to the mobilization of a number of international NGOs and to vigorous activities on their part. They have publicized grievances, "lobbied" the World Bank, and brought pressure on legislative bodies which vote its appropriations. Thus the NGOs have been effective, perhaps indispensable, vehicles to force reforms.[140]

Human rights NGOs are now beginning to play similar roles.[141] So far, because their concerns have been less understood and their voices weak, they have exerted too little influence. But it seems clear that the potential role of NGOs and human rights activists is significant and deserving encouragement from foundations and, indeed, from IDAs themselves.

PART IV
THE HUMAN RIGHTS OBLIGATIONS OF IDAs AND THE PROBLEM OF POLITICAL INTERFERENCE IN THE AFFAIRS OF STATES

The obligations described above mean that, in projects which affect people, IDAs must insist (through negotiation of covenants and other law governing the projects) that processes will be put into place to encourage authentic participation through autonomous collective action of project-affected people. They must also insist that rules will be established to assure the flow of information to them and the generation within groups of a functional knowledge of their rights in relation to interests which may be affected, that claims and grievances will be fairly heard by rights-

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138. *Compare*, Horberry, *supra* note 124, at 840. Compare, R. Blake, AIDING THE ENVIRONMENT: A STUDY OF THE ENVIRONMENTAL POLICIES, PROCEDURES, AND PERFORMANCE OF THE U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT 30, *et seq* (1980). (Response of agency to lawsuits by environmentalists.)

139. Horberry, *supra* at 818.

140. *Id. See* Blake, *supra* note 138.

141. *See supra* note 2. (Scandinavian consultations with Third World Human Rights NGOs.) *See* C. Dias, *Human Rights and Developmental Assistance: Influencing the Policies of the World Bank and the International Monetary Fund* (ICLD, 1988) (paper prepared for a Nordic country seminar on Human Rights and Development aid.)

sensitive arbiters enjoined to be fair, that protections against risks to basic interests will be established, that there will be timely redress for harms done, and that accountability will be imposed (by some appropriate arbiter) on all officials responsible for assuring adherence to these standards and processes. The involvement of "NGOs," both of the grass roots and of the "support" and "social action" varieties, should be seen as essential in projects where interests may be affected, notably to promote and protect rights of women.[142] NGOs must be entitled to and encouraged to develop "legal resources:" How else can affected interests be protected? They must participate in the creation of law for the project and in the processes of enforcing it.[143] Of course, the human rights law established for a project may vary considerably in scope and intensity depending on the purposes of the undertaking, the groups and interests directly and particularly affected, and the scale of activities envisioned. Again, the involvement of NGOs in examining these problems seems essential.

In most Third World countries, these prescriptions may be viewed by power-wielders as hostile invasions of their "sovereignty," and, in many countries, such conditions may be seen as plainly subversive, threatening well established systems of law and administration grounded in deeply entrenched norms of official behavior which hold that government information is government property. It is also held that participation must be managed when sanctioned, that autonomous NGOs are suspect, if not illegal, and that group activities must be licensed and made subject to restraints so vaguely defined as to repose unlimited discretion in officials responsible for security and governance. In these systems, official accountability runs not to people, nor to a body of autonomous administrative law incorporating rights, but to the discretion of superior officials in the hierarchy of command.

Further, even if the prescriptions proposed here were acceptable in official circles, it may be difficult to realize them in some, and perhaps many, contexts. Among poor people, official law is often conceived as an extension of an official's power — the means he uses to articulate and justify commands and sanctions. The notion that people can use law to assert *their* claims and impose accountability on officials — the notion that law empowers people — may seem contradictory to all common experience. Where rights have seldom been taken seriously, and popular understanding is lacking, there is usually a widespread aversion to the recourse to law.

Precisely because the *exercise* of rights has to do with stimulating popular action, redistributing power and disturbing patterns of behavior thought to be rooted in "culture," attempts to bring them into the

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142. *See e.g.*, M. Cernea, "*Nongovernmental Organizations and Local Development*," World Bank discussion of paper (1988).

143. For an interesting analysis of this subject by a renowned Indian jurist and legal activist, see U. Baxi, "*Law, Struggle, and Change in India: An Agendum for Activists*," a chapter in Dembo, (eds.) *supra* note 5, at 7-27.

processes of development may be vigorously resisted in development circles, as "illegal." Presumably, too, IDAs, like the U.N. itself, are constrained by the U.N. Charter (Art. 46), as well as other precepts of international law, from intervening "in matters which are essentially within the domestic jurisdiction" of states. The World Bank's Charter is even more pointed: Article IV, section 10, declares that the Bank "shall not interfere in the political affairs of any member, and "only economic considerations shall be relevant to its decisions."[144]

A focus on Article IV(10), and the question whether it negates the essential argument offered in this paper and enjoins the prescriptions urged, may provide an appropriate vehicle to analyze the "political interference" problem. The Bank is the wealthiest and most influential IDA. Article IV(10) of its Charter must indeed be properly interpreted to resolve the issues posed here; and, its distinguished Vice President and General Counsel seems to be telling us, albeit unofficially, that Article IV(10) prohibits the Bank from using its lending powers to require borrowers to protect and promote "political and civil rights" in relation to projects.[145]

Is this the "law" which should govern the Bank? A number of arguments weigh against that unhappy, perhaps overly rigid — hence, unrealistic, conclusion.

1. *Historical perspectives.* We must remember that, when the Charter was written and the Bank created in 1945, the dominant concern was to deal with the devastation of World War II.[146] The clause, which is now Article IV (10), was drafted to assure the USSR and other socialist states (e.g., Yugoslavia) that the Bank would not meddle with their political systems.[147] That pledge remains binding today in respect to all member governments.

When article IV (10) was written, the Bank's role in Asia, Africa, and even Latin America, was dimly perceived at best. The Third World had hardly come into a political existence. The concept of a "development project" and the Bank's role in relation to "projects" was quite differently conceived, because its task was to revive "developed" economies, not minister to "undeveloped" one in very different settings.[148]

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144. The World Bank's Charter, *i.e.*, The Articles of Agreement of the International Bank for Reconstruction and Development, cited in Baum and Tolbert, *supra* note 1.

145. *See* Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 DEN J. INT'L L. AND POL'Y 39 (1988). It seems fair to say that he acknowledges the Bank's obligation to protect people who are to be evicted and involuntarily resettled by project activities, and he does seem to be saying that the Bank, through projects, should protect and promote "social and economic" rights. I believe, for reasons hopefully made clear in Part 1, that the protection of these rights can never be secured without protecting "political and civil" rights, notably rights of participation.

146. *See* Morgan & Asher, *supra* note 1, at 23. *See also* art. III, Section 1(a) and, especially, 1(b) of the Bank's Charter.

147. *See* Morgan & Asher, *supra* note 1, at 27-28.

148. *Id.* Most of the Bank's early lending centered on European countries. Its Latin

When article IV (10) was drafted, the U.N. was more an aspiration that a reality. There was no body of international human rights law, no corpus of "universal" rights. The Charter obligations of members of the U.N. to promote, collectively, human rights were inchoate. The questions which trouble us here — whether and how international development assistance should be linked to human rights — were never envisioned. So, it can hardly be said that article IV (10) was written to resolve them. Rather that language, just like other provisions of the Bank's Charter, should be interpreted to make sense today in the light of four decades of subsequent history which have witnessed the emergence of a very different Bank, operating in a very different international legal order for very different purposes and in very different ways.

Particularly during the past two decades, the Bank's perception of its role in promoting "development" and its concept of a "development project" have expanded significantly. In the 1960's, the Bank emphasized "growth-oriented" projects and often pressured Third World governments to establish autonomous state corporations to administer in order to "de-politicize" its projects.[149] In 1973, Robert McNamara's famous Nairobi address signalled a significant change from "growth" to "distribution" and "redistribution." He talked about the need for both IDAs and Third World governments to "reorient [their] development policies" to conform to new Bank priorities. He talked about the imperative of "land reform" in some countries, reminding his audience that "land reform is not exclusively about land, but it is about the uses and abuses of power, and the social structures through which it is exercised." He talked about new forms of project administration to make credit, services, and water available to "small farmers." He talked about the need for "popular participation, local leadership, and decentralization." He reminded his intended audience, Third World governments, that realization of these very new objectives would require new policies often requiring "courageous political leadership."[150]

McNamara's policies were certainly *not* initiated by Third World governments, nor by the Bank's operational staff. Rather, they were pressed upon both.[151]

In the 1970s, the Bank became proactive in conceptualizing and initiating rural development and other poverty-oriented projects. Its rhetoric anticipated and legitimized "Basic Needs" approaches to "development." The Bank also began making elaborate studies of country economies, us-

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American members pressed for "development" lending, but this was a lesser priority until European recovery proceeded.

149. *Id.* at 189-90, 151-52. *See also*, Ayres, *supra* note 77, at 1-4, quoting a well known excerpt from A.D. HIRSCHMAN, DEVELOPMENT PROJECTS OBSERVED (1967) which questioned the theory that development projects could ever escape "politics" and suggesting the importance of promoting "political accountability" to intended beneficiaries and others affected.

150. *See supra* note 123.

151. *Id.* at 4-11, and Chapter 9.

ing this exercise to engage in continuing "dialogues" with national policy-makers. It initiated extensive lending for "social overhead" projects concerned with rural education, health, and population controls. It designed complex "integrated development" and "area" projects. It published "Policy Papers" concerned with "Rural Development," "Land Reform," "Health," and other sectors, which were quite candid in recognizing that many of the problems to be addressed in these "sectors" had more to do with politics than economics.[152]

Indeed, the business of designing and negotiating poverty-oriented development projects was often charged with politics. One area of controversy was in the definition of project goals. Another was the determination of the appropriate organizational form and powers of the agency (or agencies) in the recipient country which would actually administer the project and spend the Bank's loan. The Bank was often aggressive in demanding loan agreements which satisfied its aspirations.[153]

In the 1980s, the Bank has continued to play a proactive role in defining the ends and means of its lending. Its much discussed 1981 report, *Accelerated Development in Sub-Sahara Africa: An Agenda for Action*,[154] in effect, prescribed a package of reforms (presumably as a precondition for sustained Bank help in the future) which had direct, controversial political implications. It has also played a much more active role in helping countries to deal with debt crises and IMF conditions. More recently, the Bank's environmental policy statements have made it clear (at least, in theory) that projects must meet more rigorously defined standards and adhere to Bank-prescribed standards and processes. A number of other Bank statements have also made clear an aspiration to promote participation — notably, of women — in projects.[155] Further, its announced guidelines (designed to protect the interests of project-affected people who are evicted from their lands and involuntarily resettled) reflect a recognition that the Bank cannot ignore the more obvious human rights implications of its "risk-prone" projects.[156]

Indeed, the development of an international corpus of "universal" human rights law has paralleled the Bank's evolution in the 1970s and, now, conjoined with the very concept of development. It is worth recalling that the "International Bill of Rights" only came into force in the latter 1970s, as the Covenants came to be ratified in sufficient number to take effect and as other basic instruments (e.g., the 1979 U.N. Women's Convention) were promulgated. The application of human rights to develop-

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152. *See, e.g.*, the Bank's 1975 Rural Development paper cited and quoted, *supra* note 111.

153. Ayres, *supra* note 77, at Chapter 9 (entitled, "The Politics of Poverty-Oriented Projects").

154. Published by the World Bank in 1981.

155. *See, e.g., The World Bank's Support for the Alleviation of Poverty*, *supra* note 88.

156. *See supra* note 78.

ment processes through various international instruments is an even more recent historical phenomenon. But there is surely now an international consensus that rights must be seen as means as well as ends of "development."

Lawyers in IDAs — notably, the Bank — cannot ignore this history and the forces behind it, when, today, they address questions relating to their agency's legal responsibilities to people whose basic interests are affected by activities the agency promotes.

2. *Political perspectives.* The Bank and all IDAs, violate law when they advertently finance activities, or engage in practices, which violate universally recognized rights. And, in the context of projects, rights can only be protected where their exercise is promoted.

Indeed, the U.N. Charter *obligates* both IDAs and member states to promote rights which have become well established within the U.N. system.[157] It is this clear obligation, rather than the feeble processes of U.N. enforcement machinery, which gives "force" to human rights law and legitimizes demands that it be obeyed by governments. No member state can legitimately refuse or avoid this obligation, and it is hardly coercive to insist that the duty be respected.[158]

So, while the subject is obviously "political," it cannot be said to be unlawful "political interference" for an IDA to insist, as a condition of a project loan, that project-oriented law be put into place to secure recognized rights of project-affected people. Indeed, it should be unlawful to fail to insist on such protections.

Of course, the processes for negotiating components of human rights law governing a project may entail demands for controversial changes in patterns of administrative behavior. There may be disagreements among lawyers over particular interpretations and applications of human rights to particular situations, or over the appropriate means of protection. These, like other legal stipulations in loan agreements and covenants, can be matters for negotiation — but always subject to a "bottom line": that the IDA's legal arbiters be satisfied, themselves, that rights implicated will indeed be protected by the agreement negotiated.

3. *Economic perspectives.* The Bank's Charter, Article IV(10), also commands directors and officers to employ "economic considerations" exclusively in making "decisions." The clause is obviously a corollary, reinforcing the "political interference" injunction. It, too, must be interpreted in light of its original purpose, subsequent historical experience, and relevant legal developments.

The clause was intended to enjoin use of "non-economic" (e.g., ideological) criteria as grounds to determine eligibility for Bank membership

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157. *Supra* note 7.

158. *See* Schachter, *International Law Implications of U.S. Human Rights Policies*, 24 N.Y.L. SCH. L. REV. 63 (1978).

or for loans, and, presumably, it commands that Bank loans must be confined to the promotion of "economic development." None of these mandates preclude use of human rights standards in the analysis and structuring of "development" projects, and both contemporary law and the lessons of experience now obligate that task.

From the 1970s onward, the Bank has recognized that economic growth and related criteria cannot be the sole test of a project's acceptability. Indeed, projects to provide services, including benefits not easily quantifiable for the poor, are presumably legal, even where their relation to growth may be problematic.[159] Further, the Bank's internal law commands analysis of the social, as well as environmental, impact and "costs" of a project to determine acceptability. Projects which produce unredressed impoverishment as well as growth are now unacceptable.[160]

Indeed, experience has taught that human rights should be factored into "costs" and "social" analyses. The lesson is implicit in the Bank's own literature. Thus, "participation" and doing equity to women have become major concerns.[161] Plainly, the full "social costs" of "risk-prone" projects can never be estimated properly, unless rights are used to measure "costs." In lawful societies, law is used to quantify damages for wrongs done (including privileged wrongs such as expropriations), and the assessment of wrongs done depends on whose rights have been violated and in what ways. Similarly, the Bank's own extensive literature is a ready source to demonstrate the need to promote rights as both ends and means of poverty-oriented projects if these are to be sustainable as well as successful on other counts.

Obviously, the "economic considerations only" clause was never intended to immunize the Bank from accountability to law. No doubt, the drafters of the Charter would have readily agreed that no project could be financed, no matter what its contribution to a country's "economic growth," if slaves were to be used for the work of the enterprise, nor even if laborers were to be worked under conditions which violated existing ILO standards. The Charter implies exactly the contrary.[162] While "economic considerations" (now quite liberally defined) have always been used to determine what kinds of projects shall be financed, these considerations (however defined) can never preclude use of human rights standards to determine the legality of the project's design, how its real costs shall be determined, and how it shall be administered.

4. *Cultural perspectives.* It has sometimes been argued that the position taken here would mean that IDAs would have to start forcing "western" concepts of rights and "western" remedial law on "non-western"

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159. *See* Baum & Tolbert, *supra* note 1, at 417, *et seq.* Compare The World Bank's World Development Report 1984 (World Bank, 1985) (discussing problems of developing population policies).

160. Baum & Tolbert, *supra* note 1, at 471.

161. *See supra* note 155.

162. *Compare* art. I(iii) of the Bank's Charter.

peoples and cultures. Not only would this constitute "political interference" in a country's affairs, it would produce the anomalous result that rights principles would be invoked to force unwanted law and alien values and structures on communities.

The argument seriously misconceives the role of IDAs and the function and character of international human rights law in relation to development processes.

The central thrust of the Human Right to Development is simply that people must be enabled to participate in development decisions which directly and peculiarly affect their basic interests, their security in land, their habitat and food systems, their access to basic services, their physical and economic well-being, and their culture. Only through full exercise of rights of participation can people protect these interests.[163] Participation enables them to identify and claim, in their terms, the protections necessary to secure those interests. This participatory approach to the identification, assertion, and development of human rights in relation to development processes can hardly be characterized as "cultural imperialism."

On the contrary, it is the ex parte, unilateral imposition of development projects, designed, and managed by "western" elites and bureaucracies, backed up by the full force of the "modern" (but alien, "western") state which constitutes a form of cultural imperialism, as well as a source of dangers inflicted on vulnerable project-affected people. It reflects a species of paternalism and arrogance for elites in charge of planning and administering development projects to say that local "culture" requires the exclusion of project-affected people from decisions which may impact so heavily on their interests.

IDAs can insist on protection of these interests without requiring any importation of western legal forms. What is required is assurance of endogenous structures and processes which make endogenous, effective participation and protection of basic interests possible. The development of these protections must be a participatory process, so that the protections promised can be consonant with local language, culture, and ways of resolving conflict to be effective.

This participatory approach to the development of human rights in development processes enables affected people to determine themselves how the broad commands of international human rights law should be interpreted and applied within their social context. It entails a conjuncture of efforts by rights-sensitive officials and the very people whose rights are affected. That is, perhaps, the most significant way that human rights can be brought into a living existence and become "legal resources" for the vast majority of the Third World's poor.

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163. *See supra* note 112-118, and accompanying text.

Damming the Third World: Multilateral Development Banks, Environmental Diseconomies, and International Reform Pressures on the Lending Process

ZYGMUNT J.B. PLATER*

An "environmental" perspective on multilateral development bank (MDB) loans presents at least three points of analysis relevant to Third World development issues. First, it gives some very vivid and instructive examples of how the international development loan process can go awry. Second, in a practical sense it demonstrates why and how the lending process itself requires constructive reform. Third, in reviewing legal approaches to reform, including recent pressures on MDBs, it helps clarify a latent debate about the legitimacy of donor-nation pressure on international lending institutions.

This article focuses upon World Bank projects and processes, not only because they provide many useful examples of disastrous development loans, but also because in the past two years the World Bank, followed by other regional MDBs, has made a dramatic official shift in its willingness to recognize the seriousness of environmental problems caused by MDB projects. The new statements of policy and procedure reflect an attempt to reform the development loan process, to make it more rational and less prone to environmental disasters — an initiative that so far is winning mixed reviews.[1]

This article focuses on the particular example of MDB loans for the construction of large capital-intensive dam projects.[2] Dam construction

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* Professor of Law, Boston College Law School. This article is based upon a speech delivered at the Annual Meeting of the International Third World Legal Studies Association, held in conjunction with the convention of the American Association of Law Schools, in Miami, January 8, 1988.

The author is one of those erstwhile Africanists of the 1960's generation who moved away from active involvement with Third World legal issues upon returning to the United States. Since returning from Africa, my work has involved questions of environmental law (including water resources law), and cases involving public works dams, with some limited involvement with international environmental issues in Japan, India, and South America. The present analysis is thus written primarily from the perspective of an arm's length observer rather than an active participant in international dam controversies.

I gratefully acknowledge the assistance of Albert Bedecarre, Boston College Law School Class of '90, and the helpful comments of Dr. Brent Blackwelder, Professor Peter Rogers, and Bruce Rich, Esq.

1. *See* brief analysis of the evolution of environmental planning considerations in World Bank development loans, *infra* text accompanying note 24.

2. Because the article's text is derived from a speech format, it is not extensively footnoted. Background data and further information on international dam building projects can

offers one discreet sector of development assistance initiative that can be viewed on its own terms. It is an area in which major problems have indeed surfaced over the years in World Bank and other MDB projects, and it is an area in which the banks have encountered vociferous opposition from a very effective coalition of Western and Third World environmental non-governmental organizations (NGOs). Dam building offers useful opportunities to examine how engineering and financing decisions can go astray, as well as offering a limited opportunity to applaud the Bank's recent development reform efforts.

This article is organized in three parts. The first part offers a brief introduction to the environmental perspective, and then sets out a spectrum of serious environmental diseconomies which have been caused by various international dam projects an accounting that requires the analytical observer to go beyond the usual broad and imprecise rubric of "social costs" or "economic externalities". The second section of the article focuses on MDB administrative process: why have problems occurred over the years in the implementation of international development projects, and how can decisions be improved? The final section analyzes a range of available legal approaches for modifying and improving the international development loan process, focusing on the practical example of several recent cases of donor-nation pressure on the MDBs. From an observer's perspective, the most noteworthy recent improvements in the development loan process are clearly attributable to external pressures applied to MDBs by major donor countries under NGO prodding — a development that may well worry some internationalists.

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be found in the following sources: *Environmental Performance of the Multilateral Development Banks: Hearings Before the Subcommittee on International Development Institutions and Finance of the House Committee on Banking, Finance, and Urban Affairs*, 100th Cong., 1st Sess. (1987) (particularly submissions of Bruce Rich, Esq. on behalf of the Environmental Defense Fund) [hereinafter Hearings]; Aufderheide and Rich, *Environmental Reform and the Multilateral Banks*, Spring 188 WORLD POL. J. 301 (1988); Rich, Funding Deforestation: Conservation Woes at the World Bank, THE NATION, Jan. 1989 [hereinafter Deforestation]; Rich, *The Multilateral Development Banks, Environmental Policy, and the United States*, 12 ECOLOGY L. Q. 681 (1985) [hereinafter Rich, MDBs]; Address to the World Resources Institute May 5, 1987 (Washington D.C.) by World Bank President Barber B. Conable (unpublished summary available from the World Bank); *Groups Call for Action to Block World Bank Loan*, NOT MAN APART, August 1988, at 7; *International Dams Newsletter*, Vol. 1, No. 1 Winter 1985-86 (all subsequent issues available through the Environmental Policy Center and Earth Island Institute); Rabben, *Brazil on the Brink - Land, Debt, and Democracy*, THE NATION, April 30, 1988, at 597; Castantreira, *Balbina Goes on Line*, EARTH ISLAND JOURNAL, Fall, 1987; *Damming the World*, NOT MAN APART, Oct. 1983, at 10; The World Bank, Environment and Development (1984); BUND FÜR UMWELT UND NATURSCHUTZ,(1987) (available from U.S. Environmental Defense Fund) [hereinafter *Fin. Ecol. Dis.*]; Colchester, *Hydropower Projects in Central India*, in AN END TO LAUGHTER, (1985); GESELLSCHAFT FÜR BEDROHTE VÖLKER (1984) [hereinafter Action for Threatened Peoples].

I. THE ENVIRONMENTAL PERSPECTIVE AND ENVIRONMENTAL DISECONOMIES IN INTERNATIONAL DAM PROJECTS

A. *Environmentalism*

Two very contrary images of environmentalism will help the reader understand the particular perspective of environmental analysts and activists in their role on the world stage. The first image is a broadly held generalization, particularly common amongst those in the international development profession: In the eyes of many promoters, most environmentalists are a small but noisy elite, inexpert, primitive, petulant, opinionated amateurs, unfounded and insubstantial in their analysis, but unfortunately all too clever at mobilizing the media in quixotic campaigns to protect some endangered flower, fish, or dickey bird.[3] Environmentalists cannot see the forest for the trees; they are skewed in their vision and their values. In their criticism of MDB lending, they are simply "Bank-bashers."

The converse perspective is the environmentalists' view of themselves. On one hand, those who work in environmental initiatives know there is as much ecological diversity within the ranks of those who call themselves "environmentalists" as there is in a hectare of tropical rain forest, ranging from scattered cells of bright-eyed nihilists in eco-guerilla "direct actions", to polite associations of silk-stocking East Coast Brahmin, *noblesse oblige* conservationists; from loney guardians of a particular bog or forest, to advocacy organizations based in New York or Washington with thousands of members, dealing with dozens of issues around the country and the world. There are environmental groups dedicated to calm, rigorous scientific research while others emphasize economic analysis, sociological issues, legal analysis and segmentation, or artistic, historical, or quasi-religious values. Some are deeply involved in political lobbying, and others adamantly avoid political entanglement; some are characterized by Establishment sobriety, others by the fervor of camp meeting populism.

The United States has developed the most substantial and diverse environmental community; in recent years however, the U.S. example has been followed by a plethora of similarly diverse organizations in Western Europe, and in a growing number of Third World nations and localities. In some cases the distinctions between various groups in the environmental spectrum may be more defined than differences between a particular environmental organization and its non-environmental adversary. The environmental coalition that has induced recent reform pressures on the MDBs,[4] for example, has generally been characterized by its groups' pro-

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3. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978); Plater, *Reflections in a River: Agency Accountability and T.V.A.'s Tellico Dam Project*, 49 TENN. L. REV. 747 (1982); Plater, *In the Wake of the Snail Darter*, 19 J. OF L. REFORM 4 (1986).

4. This coalition was led by several U.S. groups, notably: the Environmental Defense Fund, Natural Resources Defense Council, National Wildlife Federation, Sierra Club, and Rain Forest Action Network. They were joined by: Probe International (Canada), Friends of

fessionalism, careful fact-finding, rigorous economic and legal analysis, and subtle political savvy.

On the other hand, there is a common thread that runs through virtually all the differing components of the environmental "movement" — a concern with values and ecological interconnectedness that displays practical as well as philosophical coherence. My environmental law students were once visited by David Brower, one of the more eminent U.S. environmental activists, who enjoyed the title role in the book, *Encounters With the Archdruid.*[5] Standing tall in front of the students, white-haired and raw-boned with piercing blue eyes, Brower stretched out his arm, with thumb and forefinger held about two inches apart, and said: Imagine if you will our entire planet reduced to this, the size of an egg . . . A computer ecologist did some interesting computations for me: If the planet Earth were reduced to the size of an egg, what do you think its total mass of air, of atmosphere, would be? And what would be the total mass of the water that, along with air and sunlight, sustains life on this Earth?

Based on those computations the sum total of atmosphere veiled around this egg planet Earth would be equivalent to no more than the volume of a large pea wrapped around the globe! And the water? That would be no more than the mass of a large match head, a tiny volume spread thin, just enough to fill the oceans, rivers and lakes of the world.

> Looking at the students, Brower asked, "Thinking of those limits, can you any longer not believe that our planet is a tremendously vulnerable little system, totally dependent on this fragile tissue of air and water, a thin fabric of life support made up of all the air and water the Earth will ever have?"
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> Brower's egg illustrates environmentalists' common perspective on environmentalism, an ultimately utilitarian approach in planetary terms if not project terms, based upon an attempt to make a rational accounting of all of the real long term residual costs of modern technology including consideration of economically intangible as well as tangible values, in a context of limited and fragile resources. It is an approach characterized by a consistent skepticism about projects that do not reflect comprehensive overall economic and ecological accounting.[6] From both perspectives, in the view of the development profes-

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the Earth and Survival International (Great Britain), Rain Forest Information (W. Germany), and a number of Third World organizations.

5. JOHN MCPHEE, ENCOUNTERS WITH THE ARCHDRUID (1971).

6. Although development interests here and abroad often chafe at environmentalists' meddling, and seek to characterize it as a narrow and unrealistic aesthetic initiative, the record reviewed here shows that the engineers and the people who fund them, often need the cold dose of reality represented by environmental queries. This would allow them to plan successful developments. In some cases, this will result in scrapping large-ticket capital-intensive projects. Rational systems require that there be someone built into the process whose role is the check whether the Emperor is really wearing clothes. Absent such, an effective component in the MDB process, the environmentalist must take on this role.

Thus, Environmentalism is not viewed by its advocates as a rarified aesthetic concept.

sion and in their own eyes, environmentalists often appear to be like little limpets clinging to the coattails of the engineers and financiers who day in and day out decide what will be accomplished. Developers consider this constant surveillance of issues by environmentalists to be nothing less than harassment. To the contrary. of course, Environmentalists view their efforts as broadly helpful. In either event, both recognize that environmentalists usually remain outsiders to the decisional process.

Nevertheless, environmentalists do pose important questions. Environmental accounting on large dam projects in the Third World is a case in point, illustrating the MDB process, its problems, and a functional role for environmentalism.

II. ENVIRONMENTAL DISECONOMIES IN INTERNATIONAL DAM PROJECTS

There have been many problems with large-dam development loans over the years, some well known and some not so well known. Even without adopting a North/South debt-enslavement conspiracy theory, it is possible to discern projects that have not necessarily improved developing nations' overall economic positions, where the institutional structure and momentum of the MDB lending process failed to prevent harmful economic programs and projects, and indeed created, fostered, and encouraged them.

Most well-read individuals today have a vague notion that large dam projects have produced some unanticipated problems over the years. The Aswan Dam is the most familiar example. It was a large reservoir-based development project that brought schistosomiasis outbreaks and severely-altered river flows while destroying one of the world's most productive agricultural zones in the Nile Valley and its delta region.

Environmental problems occur in a remarkably large number of different categories of residual effects, which for our purposes should not merely be lumped into the minimizing rubric of "social costs" or "external costs" as economists often feel compelled to do. Those terms tend to insulate or depreciate the overall dimensions of indirect costs imposed by various projects, and, even more imprecisely, imply that at least within the "internal" terms of a particular development project there is accurate accounting of potential costs.

Rational analysis is served better by dividing the different categories of environmental diseconomies into three classes.

The first class would include system effects like the loss of an endangered species, an effect not generally tangible in national or local eco-

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This is a minor luxury when weighed against pressing human needs for development. most environmental issues are based on the activists' insistence on the overall long term accounting of real benefits, costs, and alternatives — seeking to make administrative decisions rational only in terms of human utility. In practice, this usually means that environmental groups try to pull into an accounting, all the various real costs in order to achieve overall rationality.

nomic terms, but affecting human and ecological values, aesthetics, or planetary health. Thus, Class I diseconomies are less likely to receive consideration from the development profession based on developmental pragmatics, but are relegated to protective initiatives based on altruistic principles.

Class II effects involve off-site problems directly caused by a project that are economically tangible in national or local terms, although often not considered in MDB project accounting before or after the fact. An example would be the Aswan Dam's spreading of schistosomiasis.

Class III diseconomies include unforeseen mistakes such as building nuclear plants on earthquake faults: problems caused by a project itself that undercut the specific purpose and function of the project and thus should have been accountable in project planners' own terms of direct project self-interest. Class III effects demonstrate why it is wrong to regard environmental costs as "external" costs.

Large dams cause diseconomies in all three classes of project effects.

Project Benefits:

Most often, the engineers and planners who design dam-oriented development projects are quite accurate in their most obvious and direct project calculations. The annual volume and flow of a river can be known quite precisely, as can be the projects exact dimensions, the height from the bedrock base of the dam to the top of the spillway, creating a power head that will probably produce the projected capacity of electrical generation or the projected volume of diverted irrigation flows. In brief, whatever direct benefits the structure will mechanically produce are likely, at least in the short term, to be more or less accurately estimated in the project designing and funding process.[7]

Project Costs:

Yet logic dictates that the estimated *costs* of a project are as important as the benefits, and a project's costs typically are not fully accounted for in the MDB project price tag - notwithstanding the chronic overruns that seem to be inevitable in such projects once underway.

The following catalog of environmental costs is not likely to be represented in full in any one dam project, but all of the listed diseconomies have occurred in past projects, including World Bank financed projects. It is far more likely that many of these costs will be found cumulated in any

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7. For a detailed overall benefit-cost study of projects, see Rogers, *Planning Without Facts: A Framework for Economic Evaluation of the Three Gorges Project*, (unpublished paper presented at the December 6, 1986 symposium of the Education and Science Society in New York). Some past projects have not only experienced environmental diseconomies, but have resulted in great harms — causing an entire project to be viewed as a mistake. For example, the Balbino dam in Brazil, completed with World Bank financing. The millions of dollars spent on such projects may leave the host country in worse economic position than before. Official observers now admit the Balbino dam to be a "disaster".

Third World dam project than that none will be found. Sadly enough, virtually all Third World international development dam projects to date have suffered from a dysfunctional constrained scope of review which failed to consider serious direct and indirect environmental diseconomies.

With recent efforts by the World Bank and other regional MDBs to effect radical improvements in their decision-making processes, the following list may, one hopes, become a checklist of past disasters to be avoided in the future, rather than an historical prologue for continuing failures of project planning.

A. Class I Environmental Costs:

1. Displacement of indigenous peoples

Dams in tropical areas often displace extremely vulnerable indigenous cultures.[8] The actual number of persons forced from their ancestral homes may be relatively small, which coupled with the fact that they are often primitive or minority tribes further diminishes the attention paid them by national and international development officials. For some cultures and some peoples, however, the dislocation means death. The Bayano Dam in Panama eliminated 80% of the settled villages of the Cuna Indians. As with the Tucurui Dam in Brazil (chronicled in the semi-fictional movie "The Emerald Forest") some displaced persons from dam areas have been pushed into the territory of enemy peoples, leading to the decimation of tribal warfare. The dislocated indigenous peoples, who may never have received notice from national authorities prior to the rise of impounded waters in their homelands, often lose their religious culture as well, since many such peoples are deistic and intimately tied to the physical features of their environment.

In the forced migrations of both primitive and modernized dislocates, there can be serious disruption of social and economic life, the straining or splitting of family ties, often producing disassociated personality traits, accompanied by alcoholism or other anti-social effects, the migration of destitute individuals to cities, and so on. The numbers of dispossessed may in some cases be quite large. The Xingu Dams currently being urged upon on the World Bank by some of its staff and by the government of Brazil, would flood more than 4,000 square kilometers. The Narmada Dams project in India would ultimately displace more than 1.5 million people, in a process that has already begun with its first dam, the Sardar Sarovar Dam which is now in the process of dispossessing 70,000.[9] Boghdat (Indira Sarovar) Dam also in India would displace tens of thousands more.[10] Even these large numbers, however, are often treated

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8. J.C.N. Paul, *International Development Agencies, Human Rights and Humane Development Projects*, 17 DEN. J. OF INT'L. L. & POL'Y 67 (1989).

9. The ousted Indians who had legal title were promised title to land elsewhere, but the program has worked poorly to date. They have been left in many cases with non arable land that is not irrigated, a further irony since irrigation is a posited benefit of the dam.

10. It was recently reported that the Indian government has formally asked the World

as relatively insignificant by the national and MDB development officials who plan the projects. After all, the Indian subcontinent now has 783 million people and will have over a billion by the year 2000. The "oustees" as they are officially termed represent little political consequence; they are small tribal and ethnic minorities in the vast Indian state.

2. Rare and Endangered Wildlife

In addition to the loss of habitat for wildlife,[11] generally, the elimination of river valleys often destroys the last refuge of endangered species. The Indira Sarovar Dam would eliminate a major part of some of India's most endangered species, including the Bengal tiger, the mouse deer, the sloth bear, a particular species of buffalo, and a giant squirrel species, while generating only 106 megawatts (MW) of electricity. The Nam Choan Dam on the River Kwai Yai in Thailand will eliminate the six rarest animal species in that nation. Rare plant species are also typically lost in the flooding of a river. Because they seem to represent only aesthetic values of a rather recherche' elite, these costs are of little moment to development planners and financiers. In fact there is a utilitarian argument to be made for the preservation of endangered species — that if we don't preserve them we lose possible future knowledge about important medicines and chemical processes, the structure of which will never be discovered if we throw away the natural models, "like burning a book before we've learned to read it." Unfortunately, such arguments do not present immediate fiscal payoffs, so the preservation of rare and endangered wildlife is typically resigned to the status of a philosophic ideal, honored in the breach.

3. Archaeological Losses

Over aeons past, human settlements have usually been located along rivers, hence major human archaeological sites are likely to be lost when a river is dammed. In the proposed Usamacinta Dam project along the Mexican-Guatemalan border, there appear to be many unexplored Mayan sites that will never be seen and understood before they are forever swallowed up under the waters and mud of another reservoir. As U.S. environmentalists have learned, archaeological sites do not possess direct economic value in terms relevant to the development planners who undertake reservoir projects, so their loss is not considered to present much of a utilitarian argument for negative accounting.

B. Class II Environmental Costs

This is the area of project-cause diseconomies which is most often

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Bank to cancel the Indira Sarovar Dam project based upon re-evaluations that national interests were served better without it. 3 EARTH ISLAND J. No. 4, at 13 (Fall 1988).

11. The habitat of elephants in Southern India is being flooded. In the Kerala State, elephant migratory routes are being diverted by the reservoirs and canals associated with dam projects. As well, the other six new dam projects planned for Kerala will destroy much of the area's remaining forest habitat.

covered by revisionist resource economists, and includes by far the longest checklist of problems:

1. Deforestation

Tropical forests usually represent a major national asset in sustainable timber resource supply, as well as constituting a major source of oxygen recharge and ecosystem maintenance. The world's tropical forests, however, are being eliminated at a rate of one to two percent a year under the onslaught of slash-and-burn agriculture and national transmigration campaigns often funded by MDBs.[12] Dams accelerate the process by removing major segments of tropical forests, often with little relation to the scope of benefits provided. The Balbina Dam in Brazil, which has sacrificed 2430 square kilometers of rain forest in order to generate only 125 megawatts of power, has been described as a "disaster" by the Brazilian economics ministry that renamed it even before it has become operational. The project was completed with a World Bank energy sector loan at a cost of US $800 million.

2. Water quality effects

Beyond the acidification of impounded waters referred to below, water quality behind dams typically suffers serious degradation. Even if the muddiness and suspended solids precipitate out in the sedimentation process, impounded water is typically loaded with nutrients. When its flows are further warmed by sunlight, it often blossoms into a thick algal soup, with substantial deoxygenation and proliferation of waterweed. Though fish populations often increase dramatically in the first few years of an impoundment's life, the disturbed balance of the riverine ecosystem typically makes fish populations crash five to ten years after project completion and waterweed and algae take over the impoundment. Chemical herbicides can be used to attempt to control the waterweed problem, but these cost money and create major potential local health hazards as a further spin-off effect.

Furthermore, downstream effects of dams also cause major changes in the fish life of a river system. As in the case of the Three Gorges Dam in China, there may be a threat of losing nutrients and historical temperature conditions down river as well as an increase in saturated nitrogen problems caused by high dams that may give downstream fish "the bends," engorging their organs with nitrogen bubbles that kill them.

3. Other down river effects

As the Aswan Dam illustrated most familiarly, the impoundment of a river eliminates ancient flooding cycles which typically have been built into the ecological and human balance of downstream river valley uses. The lack of seasonal floods can eliminate the re-fertilizing effect of sediment deposition; without the recharge from upstream erosion, land adja-

12. *Fin. Eco. Dis.*, supra note 2, at 4.

cent to the downstream sediment flow is cut away and disappears, particularly in the estuaries where entire deltas can slowly dissipate.[13]

4. Seismic effects and mudslides

The collection of a large mass of water accumulates immense weight on the area of the dam site and impoundment, weight so unnatural that it may actually throw off the subterranean geological balance of a region, triggering earthquakes and other seismic effects. Mud slides may also reduce the effect of the impoundment, triggered by erosion undercutting or by destabilization caused by human deforestation efforts attracted by the reservoir development itself.

5. Human dislocation effects

As noted above in the case of indigenous peoples, the dislocation of human settlements can pose serious problems to the inhabitants involved. There are also tangible indirect economic costs that may be felt in national and regional terms, as people are shifted from more fertile to less fertile lands, and packed into higher density populations.

6. Disease

The spread of the snail-borne schistosomiasis bilharzia parasite in the Aswan system is well known. Dams cause diseases in a broad range of cases including, in addition to schistosomiasis, the spread of onocheriasis or river blindness, and increased exposure to malaria. The Tehri dam project has recently been blamed for the exposure of more than eight million people to malaria parasites, in a residual effect that had been known to health scientists at least since Ghana's Volta dam project which was completed in 1959, two decades earlier. The health effects caused by dams are often accentuated by the fact that they occur in regions far removed established health care supply. Nevertheless, they do not seem to attract the prior attention of project planners.

7. Irrigation problems

Schistosomiasis and other waterborne diseases are carried by the irrigation systems of dam projects. Other serious diseconomies can occur in irrigation programs as well. Lands which are irrigated, especially in hot climates, tend to concentrate whatever mineral salts exist in the river water, thereby producing an increasingly salinized soil system through evaporation. India's Punjab has large sections of once-arable land now salted by intense irrigation.[14] In other cases, as in the Kiambere Dam and Bura irrigation projects on Kenya's Tana River, the irrigated lands may turn out to be unsuitable for the intensive levels of irrigated agriculture posited by the engineers as the basis for irrigation benefits. The World

13. Like Aswan, the Three Gorges Dam will cause coastal erosion and saltwater intrusion problems, *id.* at 12-13.

14. *See Gesellschaft für Bedrohte Völker*, *supra* note 2.

Bank's Tana River project created less than half the irrigable hectares it was originally planned to develop, seriously diminishing the benefits promised to the dislocated populations, and raising the cost of those benefits to an average of more than US $20,000 per household.

8. Sabotage potential

Another major potentially catastrophic diseconomy which typically is not discussed by project planners is that the focus of so much capital, technology, and pent-up hydrologic pressure at *one* location increases the incentives for, and possibilities of sabotage. A high dam more than 200 meters tall may be less than 10 meters thick in poured concrete at its base. One car bomb driven over the dam anywhere along its up river side could wipe out the investment as well as the downstream population, cities, and economy.[15] Even without active sabotage, dams may contribute seriously to civil unrest. Frustration and anger against the Chico Dam plans in Ferdinand Marcos' Philippines were apparently the main reason that many local peasants and tribe members (whose political affiliation previously had been toward the Presbyterian missionary church) turned toward the communist New Peoples Army.

9. Class dislocation

Other politico-economic effects of big dams de-stabilize human social ecology as well as natural ecology. Poor people most often suffer the losses of large dam projects, while the more modernized and wealthier sectors of the population typically reap the benefits of dam construction. The natural tensions flowing from such situations can have substantial effects.

10. Dysfunctional Settlement Patterns

When a dam goes into an area, it typically attracts hordes of unskilled laborers who migrate from other areas of the country. As in the Brazilian projects, the immigrants often exacerbate problems by killing or exploiting the indigenous residents of the region, setting up shanty towns, establishing settlements lacking in government services, and practicing a form of agriculture that may accelerate the deterioration of land quality. Increased inappropriate agricultural practices, such as slash and burn agriculture and slope farming, may also drastically increase sediment loads pouring into the impoundments.

11. Loss of Foregone Development Assets

Implicit in a number of the foregoing categories is the fact that dams not only eliminate particular assets and resources located in their impoundment areas, but also eliminate whatever potential there was for appropriate economic development based upon those assets. The loss of fertile soils is a classic example. The most fertile soils of any region typically

15. The only recorded instance of this type of sabotage occurred in World War II.

are those lying in the river valleys, and these are the soils which will be completely eliminated as a useful national resource by the effects of an impoundment. The fertility of the soils, rather than crop-raising, then contributes to the dysfunctional biological oxygen demand and algal pollution effects of the impoundment. In this regard it is politically understandable why engineering and feasibility studies for large dams never include agricultural maps classifying the quality of soils that will be lost under the impoundments. In the same way, they rarely include maps showing archaeological losses, nor losses of mineral deposits which will be placed under water. Typically, project planning maps cover only the discreet towns and commercial centers existing within the projected reservoir areas, entities which obviously and unavoidably will require removal operations. To register the existence of valuable assets to be lost in the project area would directly undercut the project's cost-benefit ratios, and hence is counter intuitive to development planners.

12. Cumulative effects

The practical reality of a large dam project is that many of the foregoing costs have cumulative synergistic effects. The biological, human, social, and economic effects of a series of dam projects in a region can cause qualitatively greater compounded problems, as populations grow more densely settled, on less fertile ground, with more susceptibility to disease, and less availability of food.

13. Alternative Technologies Avoided

Finally, a further logical loss caused by major capital focus on dam projects is that they foreclose a nation's ability to undertake alternative technologies for development. The $500 million Nam Choan Dam in Thailand will cause a host of environmental problems, while the cost of its construction and its electrical power supply system will prevent Thailand from investing in cogeneration technology. Cogeneration could have produced more gigawatt hours than the dam for only one-fourth the dam project's cost, by providing appropriate generation facilities in conjunction with the boilers of already-existing sugar processing plants throughout the country.[16] In 1986 it was predicted that electricity consumption by major power users in Brazil could be cut 30% by the year 2000 through energy conservation and efficiency measures. Such programs would cost $10 billion compared to the $44 billion that building the unnecessary 22,000 megawatts of generating power would cost. The institutional initiative and bureaucratic mass represented by dam projects foreclose the implementation of potentially more beneficial national development strategies, and the resultant costs can be tangible and cumulative.

Further, dam projects may produce benefits that are not particularly needed by a nation, and may promote inappropriate low-multiplier ex-

16. Hearings, *supra* note 2 (statement by Bruce Rich).

ploitive industries. The Bakun Dam in Sarawak, besides eliminating the homes of five thousand tribal people and contributing to serious deforestation problems, is being built as a location for the Reynolds Aluminum Co. facilities which were prevented by pollution laws from expanding operations along the Elbe River in the Federal Republic of Germany. Reynolds will accordingly move its operations and its pollution to the Third World, at Bakun Dam.

C. Class III Environmental Costs

It is extraordinary to discover that a major environmental category of project defects that are quite serious, quite foreseeable, and not at all "external" to project accounting, have nevertheless regularly escaped the prior attention, and subsequently haunted the project efforts, of international dam builders.

1. Sedimentation

Rivers carry suspended solids eroded from upstream in their watersheds. When the flow of a river is slowed behind a dam, the soils and sands carried by the water precipitate down, and can fill up a reservoir impoundment area with remarkable speed. One large project on the Yellow River in China (a Soviet project), so miscalculated the sedimentation rate that the dam was filled up with mud deposits before it was even finished. It now stands as an embarrassing albatross, the river flowing straight over its spillway with no effective water storage impoundment effect. The Tehri Dam in India was planned to produce benefits over a serviceable life of 100 years. Because of sedimentation, it currently is likely to be filled up in thirty to forty years. The Tarbela Dam in Pakistan completed in the 1970's will have mud levels reaching its hydroelectric intakes by 1992, requiring multi-million dollar retro-fitting is an attempt to rectify the situation. The $20 billion Three Gorges Dam project in China risks massive sedimentation from its impoundment effect on the muddy Yangtze River. This sedimentation is unlikely to be prevented by recently-designed diversion tunnels near the dam site. Moreover, sedimentation turns out to be a problem that is not restricted to areas nearest the dam. Waters slow far upstream where they enter the impoundment, in some cases beginning to deposit their sediment loads a hundred miles from the dam structure itself, causing obstructions and water elevations unforeseen by the engineers.[17]

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17. When river waters deposit their suspended solids at the upstream end of a reservoir, they form large sand bars that rise toward the level of the reservoir itself. Because the suspended grains of sand and soil interlock upon deposition, they do not dislodge by increased water flows on the upper surface. Accordingly, the "hump" of deposited sediments expands, and forces the waters to rise over it causing further up river sediment deposits. As this process continues, the upstream elevation of the reservoir may rise as much as a meter higher than top of the reservoir causing extreme flooding. This changes the hydrologic characteristics of the planned impoundment as well. Interview with Dr. Philip Williams, in Washington, D.C. (April 18, 1987) (Dr. Williams is a freelance hydrolocist).

Sedimentation also causes a large number of indirect Class II diseconomies that are typically ignored by feasibility studies. Because sedimentation so seriously eliminates water storage capacity, cutting down on hydroelectric and irrigation potential, it is simply extraordinary that engineering feasibility studies can repeatedly ignore or underestimate its effects.

2. Scour and other structural effects

Large dams produce downstream discharges of tremendous force, which can cause unforeseen destructive effects to the dam structures themselves. The Tarbela dam had a concrete spillway that produced flows strong enough to cut the spillway itself away on the downstream side, requiring construction of a massive deflector system rushed into place to control the destructive process.

3. Destructive water quality

Large dams typically cause major off site Class II water quality consequences. Where large amounts of trees and vegetation were simply inundated without being removed from the reservoir area prior to impoundment, there is a marked increase in the acidity of the river's waters, which not only has ecological effects but also causes extensive corrosion of hydroelectric turbines so that they can be used for only a fraction of their normal working lives. This happens in a number of tropical dams, particularly large shallow impoundments like Brazil's Tucurui or Balbina dams. Drifting vegetation and logs clog turbines and spillways in a long-continuing process in which the organic materials of the impoundment area break up and slowly drift downstream.

4. Structural failure

Approximately one percent of the world's dams actually do fail, sometimes because their bedrock geology was not sufficiently studied (as with the Teton Dam in the United States). In others seismic effects are generated by the dams themselves, by having such huge masses of water collected in fragile geological zones. These obvious and direct Class III costs have often been used by environmentalists to build cases for modification or abandonment of international dam projects. Though they represent serious concerns, including spill over effects into more extended Class II diseconomies, the momentum of the development process still produces contemporary dam project designs without taking sufficient account of even these most direct project problems. This is most perplexing, in light of the promoters' purported project orientation.

Summary: MDB Dam Projects Cause Serious Real Environmental Costs

In sum, the catalog of potential and existing problems caused by large dam projects is sobering, and would seem to require logical consideration along with the glowing promises of development that typically accompany such proposals. Serious environmental problems do occur. The

World Bank has been a major part of the problem, spending $30 billion to date for large dams in the Third World, with at least 400,000 involuntarily displaced persons dislocated from reservoir impoundment areas since 1979. Despite recent improvements in World Bank policy, another 1.5 million persons in India's Narmada Project alone may have to leave. Indeed, the momentum of the World Bank lending process over the past decades not only failed to prevent but appears to have created, fostered, and encouraged diseconomic projects in a number of Third World nations.

III. ADMINISTRATIVE PROCESS: PROBLEMS AND REFORMS

A. *The Causes of the Problems*

Faced with the preceding catalogue of diseconomies and their serious cumulative effects, the question is how such problems could have occurred? In many cases in the past, the answer seems to be that MDBs, to a major degree, simply ignored these potential diseconomies in their large dam development projects. The engineers and financial development planners who hypothesized and created projects did not take account of a wide array of negative economic effects, tangible as well as intangible. At another level, however, the question must be asked why the process did so ignore predictable and measurably substantial diseconomies. To surmise how the international lending process may go awry, it is relevant to view the process from an environmentalist observer's perspective. To an environmentalist, the problem comes down to the fact that the MDB development loan process is a closed system which quite naturally resists consideration of the negative consequences of its own development mission.

A large dam project can be born in a number of different ways, by the request of a host nation government, by the suggestion of international engineering and construction companies which often lobby Third World governments to urge them to request dams. If one goes back through project histories, however, the primary project initiators in many cases are the multi-lateral development bank's staffers themselves. Bank staff constantly review conditions in client regions and, as in the case of the World Bank, prepare "sector analyses" which hypothesize a variety of different development projects which may be attractive opportunities for World Bank loans.

Already environmentalist observers would assert that there is a problem. Within the World Bank, staffers have "lending targets", which are levels of monetary lending that the Bank wishes to achieve in a given year. These lending targets are typically increased annually by the Bank's management. This form of incentive loads the dice in favor of large capital-intensive projects and against lower-budget alternatives that might ultimately prove to be more fitting development initiatives considering the needs of target nations. Appropriate lower-tech alternatives may exist, but may take as much time and effort in their preparation as plans for

large projects. Low tech projects include agricultural cooperative systems, decentralized low-technology production facilities, public education, low mechanization modern agriculture, and other decentralized infrastructure projects. To some MDB staff, it surely must be more enticing to use their time to produce a multimillion dollar dam.

Once a dam project is hypothesized and given a name ("identified" in World Bank parlance) it already begins to take on a life of its own. The host country makes a formal request for MDB consideration of the dam project. A sign of the realities of project planning is that in some cases the host country government may not be actively involved with the preparation of its own request, and may get to see it as prepared by the MDB staff only shortly before the time the formal request is actually made. Within the MDB as well as the host nation, the name gives the project a concrete identity. It becomes "the Dunkoro Dam Project", and the concept of naming is clear: a particular place, a particular kind of project, a known development commodity, a particularly highly-focused form of capital investment, and a particular set of stirring development images - mighty piers of concrete, thundering spillways, clouds of white spume with electrical generation towers in the background.

Once BCntified", the proposed dam project goes into the preparation feasibility study stages preparing and processing a "project brief".[18] This is very much a closed process and typically carried out by MDB staff and/or working groups from engineering firms involved in the development profession. There is typically no input whatsoever from those who will be most directly effected by the dam proposal, and often very little input from the host country government. Feasibility studies tend to be construction analyses done by the potential construction interests. For instance, the feasibility study for the Three Gorges Dam in China was prepared by a consortium of Canadian corporations who were likely to be prime candidates for the construction of the dam itself. Multinational contractors are an intimate part of the development profession, and typically play an active role within the MDB planning process. The graphics prepared in the feasibility studies incorporate the shortcomings noted in the environmental overview above by tending to focus on the dam structure itself and its reservoir impoundment, on projected power demand curves and repayment schedules. The studies do not include maps of the natural assets that will be eliminated by the project, no soil maps showing the fertile soils that will be inundated, with little or no attempt to assess intangible costs and potential development assets foregone. Generally, feasibility studies tend to prove the feasibility of the projects as hypothesized.

After the identification and preparation stages in the project cycle, the dam proposal passes to the project appraisal report stage. At this point the staff takes the initial feasibility studies and prepares an overall

18. *See generally*, The World Bank, *The Project Cycle* (1987).

presentation of the project for the Board, typically including an overall cost-benefit assessment. Prior to 1987, this appraisal stage was the only occasion where the small environmental staff of the World Bank was required to have any formal involvement in the project analysis process. Unfortunately, project appraisal reports replicate much of the same mission momentum discernible in prior stages of the process. From the perspective of outside observers, environmental analysts, and resource economists, the benefit projections typically tend to expand estimated potential benefits, and constrain the range and magnitude of estimated direct and indirect project costs. The environmental inputs and commentary on projects at this stage tend to be rather flaccid and forlorn. In the case of the Nam Choan Dam on the River Kwai Yai, the environmental staff noted the presence of six endangered species, yet was only able to insert the comment that these rarest species, "will be forced to move elsewhere". The tone of the environmental staff was resigned to the inevitability of project completion, positing a biological relocation which in scientific terms was highly unlikely to be successful.

In some cases projected benefits do not aggregate sufficient amounts to justify projected costs. World Bank project appraisal reports have occasionally based their subsequent positive judgments that a project should move forward on the assertion that the dam would create substantial amounts of "unquantified benefits." This rationale is paralleled by American pork barrel construction agencies which claim intangible multiplier effects on the plus side of the ledger while typically avoiding consideration of unquantified negatives.

In some cases, as with the Narmada project, the host country ministries will promote the development loan, while by-passing normal domestic review by those ministries that might raise questions regarding indigenous peoples, population resettlement problems, and environmental impacts. In the Narmada case the government of India had not issued its required environmental clearance prior to project approval. The necessary studies had not been made, yet the environment ministry was pressured into making "preliminary approval" without a factual record, thus permitting the loan to be executed.

Prior to final loan commitment, a project must be approved by the Board of Directors. By this time the process has gone from "lending target", through increasing institutional investment in the production of the dam proposal, and substantial momentum has been generated within the MDB. It is little wonder that the executive directors rarely if ever have refused to approve such projects, absent extraordinary external pressures.[19]

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19. Some environmental observers argue that the boards of directors that represent donor nations (i.e. the Executive directors) consistently defer to the staff on major loans and, therefore, exercise little control over the MDB's. According to some sources within the profession, the members of the dam building fraternity all carry around a handbook listing

B. An environmental perspective on the process

Looking at this development process, environmental analysts would note the institutional mission's orientation throughout the stages of project development which narrows the scope of planning considerations and makes the ultimate project a foregone conclusion. Throughout the process the development loan is dominated by the engineering perspective — namely, what can be done physically, with existing technology — and the multifaceted inducements of large capital-intensive projects. There are institutional benefits for all the varied interests in the development profession, for multinational construction corporations and their home governments, (Italy and France, for example, have often taken a strong role in encouraging construction of such large projects by their own nationals), for promotional "insiders" within the host country (development ministries and those interests which will profit most directly in fiscal and political terms from the project activity), and for the MDB itself. The active participants in the formation and development of the particular project become invested in its progress. The participating interests will profit either in fiscal terms or in mission terms with a sense of accomplishment for having built a particular large dam.

Environmentalists would analyze this problem as an immensely powerful decisional process run entirely by "insiders" whose direct motivations (profit, institutional momentum, political power accrued, etc.) are not directly tied to the overall best rational development of the particular country or region. The main motivator for most participants in the process is unlikely to be "doing what is best for Gabon." Environmentalists would assert that Gabon's particular national needs merely serve as an opportunity for the engine of the development apparatus to do its thing. Hence, the focus is on building the largest possible projects, with an aversion to low-tech low-budget projects like investment in education, social infrastructure, and decentralized production. Environmental critics recognize, that focus on rational accounting may actually miss the real motivations of some of the development establishment as it applies to a particular project. Rationality is not necessarily the dominating internal drive. The altruistic desire to transfer maximum benefits to a needy people is not always the dominating motive for large capital-intensive project promoters. The self-serving motivations of human nature are what environmentalists see, and to some extent there may be truth in the observation. Human organizations seek to perpetuate themselves. There is a need to keep sustaining and expanding activity to justify organizational existence. There is ego gratification the image of something very large that has resulted from one's efforts. Profits for some of the actors in the development process are certainly a motivation. In some cases involving developing countries, corruption may help push along projects that involve billions of dollars. There is also a sort of engineer's technological impera-

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the world's biggest dams, and spend their time publishing papers in an attempt to prove theirs is the biggest.

tive, "what can be built must be built". In the case of dams, moreover, there may even be a touch of atavistic magic. There is something visceral in the pleasure that comes from making nature do one's work, throwing up a fragile barrier before the forces of a river's hydraulic power, watching the river tamed from raging torrent to placid pond, rising up behind a man-made wall. There is also something of an engineering competition. The largest power output dam in the world, Itaipu in Brazil, generates about 11000 megawatts (MW). When it became clear that raising the planned height of the Three Gorges Dam in China could make it the largest generator dam in the world (13,000 MW), the project's engineers planned to substantially increase the dam's originally - hypothesized elevation. Since then, the planners for the dam at Xingu in Brazil are meeting the Three Gorges challenge, apparently planning their dam so that theirs can be the biggest.[20]

C. Reforms and Reformers

It may well be that the environmental perspective is unnecessarily jaundiced. The record of MDB development loans for large dam projects over the years, however, continuing in the present and projected into the immediate future, indicates that serious problems indeed do occur. Development initiatives with serious diseconomies are not only not prevented, but are born, nurtured, and pushed to the fruition by the MDB development lending mechanism over-capitalized and under-planned. It is thus altogether likely that some of these dam projects should not, if there were an overall rational accounting, be built, while others should be undertaken only with very severe modifications and mitigation built into the project proposals.

Only recently has such overall rational accounting been encouraged within the MDB process itself. Pressures for reform have been generated not from within the MDB structure or within the development profession, but by external reformers, almost exclusively non-governmental organizations in affected Third World regions and similar interest groups in the developed nations. The coalition that mobilized reform pressures upon MDB development lending was initially put together by representatives of several U.S. environmental groups that had developed extensive legal and political expertise in the course of fifteen years of domestic environmental initiatives, many, as it happens, involved water projects. These groups included the Environmental Defense Fund, the Environmental Policy Institute, the National Resources Defense Council, Sierra Club, National Wildlife Federation, Friends of the Earth, and Rain forest Action Network. Some of these groups had occasional international ex-

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20. According to one source within the profession who would rather not be quoted by name, "the members of the dam building fraternity all carry around with them this handbook listing the world's biggest dams; they're forever publishing papers trying to prove that theirs is the biggest — the tallest, the widest, the most massive, the biggest earth-fill, most water impounded, highest generative capacity, etc."

periences, but the MDB reform effort was notable for its comprehensiveness, persistence, and international networking. It soon was joined by the Canadian Probe International, the British branches of Friends of the Earth and Survival International, the West German Regenwald (Rain forest) Information, plus a critically important number of Third World NGOs which formed to resist local development projects and joined the network, sometimes at the risk of lives and safety.[21]

This coalition began to build an analytical factual record detailing the destructive consequences and diseconomies of the MDB's neoclassical economics approach to development lending. In the case of dams, they collected examples of cases involving most of the kinds of project diseconomies noted earlier. The strategy was to focus pressure on the World Bank, figuring that it was potentially more responsive than the host countries or the smaller regional MDBs, and was vulnerable in the political context of the U.S. and many Western donor nations. The World Bank did not have a developed or extensive political constituency within the U.S. Congress or European parliaments. In functional terms, the NGO coalition urged a series of changes in the way MDBs planned their development project, including:

1. Early overview analysis

A meaningful, comprehensive, realistic hard look, at an early stage of project analysis, incorporating a sufficient rational overview so that projects which make little overall sense can be filtered out of the process quickly, before they gather institutional investment and momentum.

2. Active open consideration of alternatives

One of the major problems that reformers see in the process is that once the MDB staff and development interests have focused on a particular high-technology, highly capitalized project idea, they systematically avoid considering ranges of alternatives that might preclude the adoption of the proposed dam. Rational cost-benefit analysis development planning can only be done in a context of considering common sense alternatives to proposals. Some form of environmental impact statement process, reviewable within the agency and by external observers, is useful in attempting to assure that the indirect intangible or long term diffuse and cumulative diseconomies of a project will be considered along with the direct projected benefits normally featured in feasibility studies.

Open information is part of a rational process. MDBs have characteristically kept their data confidential and inaccessible while projects were brought to the point of construction. Nevertheless, the computer profession reminds us of the epigram "garbage-in-garbage-out"; a decisional process can only be as good as the range and accuracy of the data supplied. If a process systematically excludes all data that is negative to com-

21. *See* Aufderheide and Rich, *supra* note 2, at 311-313.

pletion of a project, then it cannot be expected that the decision will be fully rational nor that the project will develop as planned. "What the banks are in some need of, from the environmentalists' perspective, is *glasnost*."[22]

3. Participation of non-government organizations

NGOs are an important source of real life evidence of the effects of a project on a region, nation, and indeed the planet. NGO participation is important in more than political terms. It assures that a wide range of real costs and benefits will be considered in determining the feasibility of a project. Until recently the World Bank, like other MDBs, asserted that it was inappropriate for it to communicate with NGOs because "the Bank can talk only with governments." Ironically, there always existed a constant flow of communication between MDBs and a large number of private entities, particularly multinational construction firms, development consultants, and representatives of regional development associations. The integration of informed NGO participants into the development process is a way to open a conduit of relevant information that is otherwise typically excluded from development loan considerations.

4. Subsequent realistic audits

Projects as they are completed and put into operation should be subject to retrospective studies for determining the extent to which they actually realized the benefits posited and the extent to which diseconomies and costs have created problems. Because the actual performance of dams has been so problematic, there appears never to have been a comprehensive accounting overview of the true costs and benefits of a completed international dam project. The World Bank does prepare some retrospective project reports, but these are quite limited in the scope of accounted costs and consequential effects. This hesitancy, environmentalists would say, demonstrates an aversion to gathering the hard facts which might reveal that other ongoing projects had better not be built. As a means of mid-course correction and process feedback, retrospective audits are a logical requirement of an ongoing successful development program.

5. External accountability

If it is difficult for a system to police itself, it is useful to have mechanisms set up for outside observers to have an authoritative analytical role in the process. Whether this be some form of judicial review, or economic and social review tribunal, external accountability is one of the ways in which the mistakes of the past can realistically be improved.

Those reformers who have been attempting to implement these functional improvements in the MDB development loan system have been skeptical of MDB reform from within, and rarely find it practical to focus their efforts on intellectual persuasion. For their part, the MDBs have

22. *Id.* at 318.

until recently responded inhospitably to the reform message. Over the past decade, the most active efforts for environmental reforms in the lending process have come from outside the institutional structure. In Third World dam locations, for example, projects have been resisted through strikes, demonstrations, sabotage, and human road blocks. These efforts have often garnered publicity, have sometimes encouraged some political re-evaluation of positions, but rarely have been successful in the long term, and rarely have been able to present its positions in a comprehensively, articulated form. Some resistance to the current development process has been in the nature of civil insurgencies. In other cases, there have been political backlashes against development initiatives. In the developed nations some NGOs, not necessarily part of the MDB coalition have staged media events in an attempt to embarrass the MDBs through sit-ins, or hanging banners with embarrassing messages on the facades of MDB headquarters.

If giving consideration to the problems and potential reforms of the MDB development loan system is valuable, there must be more credible means by which the system can integrate the merits of these pluralistic points of view.

IV. LEGAL AVENUES FOR REFORM, AND THE QUESTION OF DONOR-NATION PRESSURE

Faced with a situation poising MDB development interests and their NGO critics at loggerheads, it is altogether desirable that some institutionalized resolution of the issues be found within the legal system, rather than in the protracted "eco-guerilla" actions in the Western media and back country locations of Third World projects.

A. Evolving International Law Norms

The law, of course, operates in different ways in different arenas. At the most general level, a reformation of the MDB lending process would involve legal initiatives aimed at defining specifically applicable principles of international law. Professor Paul has analyzed how the definition of human rights in developing countries could provide a basis for MDBs to reform the process by which they may disrupt and dispossess indigenous populations in development areas.[23] The dramatic human costs occasioned by the World Bank's Narmada project, or the Balbina and Itaparica projects in Brazil, might well provide a setting where such human rights might be perceived as threatened. At this level, however, the definition of international law principles is quite abstract, and as yet provides little practically applicable legal theory.

Some environmental activists have accordingly gone beyond the broad definition of human rights to assert that in some cases MDB dam

23. Paul, *supra* note 8.

projects have implemented "genocide" in their effect upon indigenous peoples. If such a claim were substantiated, it could draw upon recognized positive international law norms and conventions. Such claims of genocide, however, represent an extremely drastic avenue for integrating human costs into development planning. A genocide argument is not likely to promote careful adjustment of interests, but rather invites inflexible polarization.

Other broad international principles might be found in international declarations, such as the U.N. Declaration on the Human Environment issued at Stockholm in 1972. In particular, Articles 13, 14, 15 and 25 of that Declaration might arguably declare international law principles requiring overall review and sensitivity to social and natural resource diseconomies caused by development projects. Of course, the problem with the Stockholm Declaration and other such general declarations is they have no direct practical applicability and must await future specific implementation by U.N. action, by treaty or convention.

B. International Conventions

Some existing conventions do offer potential applicability to the problems posed by poorly conceived dam development projects. A fascinating example occurred in the Narmada project. There, faced with massive dislocation of indigenous people and little planning for relocation and mitigation of the effects on villages and tribal cultures, threatened indigenous peoples formed a union under the auspices of the International Federation of Plantation and Agricultural Workers (IFPAW). In October, 1985, the IFPAW filed a complaint with the International Labor Organization in Geneva alleging multiple violations of Convention Article 107 of the International Labor Organization. Under the terms of that convention, signatory nations including India are prohibited from taking development actions which lower the living standard of indigenous peoples or fail to supply them with equivalent cultivatable land. The ILO forwarded those allegations to India, with an initial official expression of concern that the convention was being violated. Faced with this ILO inquiry, both the government of India and the World Bank responded with indignation to the international second-guessing of their plans for Narmada. After several months of tense political negotiations, the ILO was persuaded to withdraw from its review of the effects of the Narmada project. Despite the fact that the ILO intervention was ultimately neutralized, however, this initiative showed the potential utility of review and pressure embodied in existing conventions, as well as the potent ability of the development structure to resist such intervention.

C. Internal MDB Law

There exist within the MDBs several types of "law" which can effect the implementation of reform in the development process. In 1980 all major MDBs signed a "Declaration of Environmental Policies and Proce-

dures Relating to Development", a general statement of commitment to integrate environmental concerns into the development planning process. Some MDBs, including the World Bank, took minor actions to implement the declaration, including hiring of one or more environmentalists on staff.[24] in general the actions of the MDBs amounted to little more than symbolic gestures. A poll of the Bank's regional directors three years after the signing showed that a significant number knew nothing of the existence of the Bank's environmental policy declaration.

Each MDB does have the potential to issue internal regulations and guidelines that would assure implementation of analysis at effective points in the decision-making process. Until recently, however, there was evidently little interest in doing so. The concerns of environmental and indigenous people's advocates were treated as minor marginal considerations. Furthermore, there is "law" in each development loan itself, a sort of project-by-project "law of the case". When an MDB negotiates a development loan with a host country, it can write in whatever requirements it wishes, and these requirements can apply tremendous constraints upon host countries to assure that projects planned will not create human or ecological destruction. Unfortunately, this potential is only as good as the institutional motivation setting it into effect, and such incentive has been hard to discern.

The World Bank can be applauded, however, for actions it has taken in the past two years. On May 5, 1987, Chairman Barber Conable made a formal address asserting that environmental considerations were not only useful ideals to integrate into the planning process, but substantively functional necessities to assure successful projects. "Good ecology", he stated, "is good economics . . . If indeed the World Bank has been part of the problem in the past, it can and will be a strong force in finding solutions in the future."[25] Conable's address was the first major change within the World Bank's internal government and appears to have led to practical results. The Bapai Dam in Nepal appears to have been halted under the review due to the chairman's address. From around the world, NGOs and the environment ministers of host countries have reported that World Bank staff and development interests within the particular countries have taken seriously for the first time the arguments, data, and environmental accounting procedures. The Inter American Development Bank has hired an environmental staff. The African Development Bank also appears to have internalized the lesson that projects that create environmental problems will often have an economic backlash that renders major development loan initiatives nugatory. In the Itaparica Dam in Brazil, the World Bank insisted that the "law of the project" include not only promises on the part of the host country government that indigenous

24. In 1984 the Bank incorporated comprehensive policy declarations and procedures into the Operations Manual. Yet these procedures seem to have been breached. President Constable's Address, *supra* note 2.

25. *Id.*

people would be adequately relocated, (assurances which in the past had often turned out to be merely rhetorical,) but also that enforceable contracts be made with local NGOs so that if relocation efforts were nonexistent or inadequate, the persons directly affected would have an immediately available legal remedy in the courts of the host country.[26]

In the last two years the World Bank has implemented a major reorganization, dividing its operations into four global regions with a central directorate in Washington, D.C. In 1980, the World Bank had one ecologist on its entire world-wide staff. In May 1987 the World Bank had only three environmental reviewers, trying to analyze 300 projects each year in addition to their public relations duties.[27] After the reorganization and President Conable's environmental policy declaration of May 5, 1987, the Bank created an Environmental Department in Washington, D.C. and environmental units in each region. Environmental guidelines and the Operations Manual have been updated, and a new sensitivity to environmental diseconomies is evident.

Because of the inherent tensions between promotional momentum and conservation principles, environmental observers are as skeptical as ever about internal MDB reform efforts and have adopted a wait and see attitude. "We like what they're saying," says one participant, "but we are still seeing the same old stuff coming out at the end of the pipeline, especially in the energy sector."[28] They find hope in the fact that after years of insistence that "the Bank will talk only to governments", the World Bank has entered into active dialogues with the NGOs, including the establishment of a formal "World Bank - NGO Committee" to institutionalize communication.[29]

Noting the apparent dramatic shift in MDB environmental consciousness, environmental observers nevertheless ponder why this shift has occurred. In part the MDB's newfound recognition of the rational

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26. There are reports that Electrosul, a state utility, has recently reneged on such a promise. NOT MAN APART. *supra* note 2, at 7.

27. *Deforestation*, supra note 2, at 3.

28. Telephone interview with Dr. Brent Blackwelder (Nov. 30, 1988).

29. The following is from an affirmative speech to the Society for International Development on April 22, 1988, by Moeen A. Qureshi, the Senior Vice President of Operations in the World bank:

> The doors of our headquarters and of our resident missions around the world are open. We hope new partners for development and new allies against poverty, will come to see us, even though World Bank staff seeks to find them . . . As late as ten years ago, what we knew about World Bank operations in many countries depended mainly on bureaucratic lines of information and supervision. Within developing country-governments implementing agencies reported on what they were doing, and country authorities tried to maintain quality control. The Bank supervised the projects it financed, but within the Bank too, we depended on bureaucratic lines of management . . .

In today's global village, NGO networks can report a problem in rural Northeast Brazil to Sao Paolo, and even throughout the world within a week. Where bureaucratic eyes are astigmatic, NGO's provide vivid images of what is really happening at the grassroots level.

importance of environmental accounting may be attributed to a significant 1987 report of the World Commission on Environment and Development.[30] This "Brundtland Report" was available to President Conable in draft form when he made his May 5th speech, prepared by a blue ribbon international commission, (Mrs. Brundtland is the Prime Minister of Norway and was among high ranking national officials from 22 nations; the U.S. representative was William Ruckelshaus), which issued a strong call for drastic changes in international environmental performance. The report targeted international economic pressures and lending programs as important causes of past problems, and indispensable parts of necessary fundamental international environmental reforms.

While environmentalists may applaud the MDB initiatives they have seen within the last two years, there remains a strong and not unreasonable suspicion in the minds of many NGO observers that the dominating reasons these reforms were implemented were due to outside forces. A critical motivation for the World Bank's policy shift, beyond the intellectual persuasions of the Brundtland commission's findings, appears to have been a practical threat of statutory pressure on Bank appropriations, and a subsequent barrage of pressures from donor nations, orchestrated by the coalition of environmental NGOs.

D. Donor-Nation Pressure on MDB Policy

There is no accepted analysis of the status and legitimacy of donor-nation pressure seeking to force particular policy initiatives upon international lending organizations, but actions focussed on environmentalism and indigenous peoples have recently created prime examples of this phenomenon. An initial and quite dramatic example of such socio-ecological pressure originated in a U.S. congressional initiative. Over the past ten years, the United States NGO coalition has been increasingly successful in persuading members of Congress that capital-intensive, multi-lateral development projects may cause more problems than they solve.

The environmental coalition levied congressional financial pressures on the MDBs drawing upon the tactics of a successful initiative against commercial whaling which used U.S. statutes threatening import cutoffs to pressure parties to the International Whaling Convention. Senator Robert Kasten, Republican from Wisconsin and past chairman of the relevant Senate appropriations subcommittee, emerged as a particularly important congressional figure in this initiative, which was backed by current chairman Daniel Inouye and Rep. David Obey, who holds the parallel position in the House. Over the last several fiscal years, Kasten and Obey have attached an elaborate statutory provision to the annual bill appropriating money for the World Bank.[31] These appropriations rid-

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30. *See e.g.*, Pub.L. No. 99-500, Title 1 sec. 161(f), 100 Stat. 1783-232 (1986).

31. BRUNDTLAND, OUR COMMON FUTURE (1987). President Conable's public shift in policy followed shortly after a CBS "60 Minutes" excoriation of the Bank's Polonozoeste Pro-

ers declared that the executive directors of MDBs who were appointed by the U.S. must "vigorously promote the integration of environmental and cultural assessments and protections in the processing of multilateral loans," while attaching further requirements to enforce that goal. The statutory language is detailed, contains very specific mandates and prohibitions, and has been enforced by periodic accountings from the Treasury, which through its IDCA and NAC is directly responsible for briefing U.S. executive directors to the World Bank and other multilateral development banks. The U.S. Congress has held 21 hearings on the environmental problems of Bank lending over the past five years.[32] Because of the pressure applied through U.S. legislation upon the Treasury department, the U.S. representatives have undertaken critical reviews of ongoing development loan proposals and in several cases have voted against or abstained from loan approvals. Because the United States wields such a major bloc of votes within the MDBs (voting being proportionate to the financial sponsorship share of each nation), such actions have created more than a mere symbolic stance, and have enforced upon the World Bank the need to pay attention to the environmental principles the American statutes represent.

The pressures brought to bear upon the MDBs did not stop with the U.S. initiatives. In the past two years there has been a growing number of Western donor nations which have joined in with declarations of the practical importance of environmental analyses in MDB lending, and direct requests that the MDB boards incorporate environmental review into a reformed development loan process. These pressures have come from West Germany, Great Britain, the Netherlands, and the Scandinavian countries. At recent Bank annual meetings in Berlin, Canada asked the Board of Directors to implement an environmental impact statement review procedure for all development construction loan projects.

The NGO coalition, in sum, has helped to marshal a wide range of external donor nation pressures upon the MDB lending process, and can be credited with a fair measure of whatever successes flow from the ongoing MDB reforms.

E. The Propriety of Donor Nation Pressure on MDBs

Even assuming that salutary environmental reforms were instigated because of donor-nation pressure, the use of direct pressure on an international compact entity raises worrisome concerns in some observers' minds. No matter how altruistic, certain nations have the ability to influence the MDBs in part because they possess financial leverage on the Bank board. What then is the propriety of a donor nation's applying di-

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ject. *See Deforestation, supra* note 2, at 1.

32. By statute, the Agency for International Development in the U.S. Department of State is required to publish a biannual list of MDB projects that confront environmental problems, as an "early warning system". Aufderheide and Rich, *supra* note 2 at 309-310.

rect pressure to lending decisions of the Bank? The question is presented with particular clarity in the recent U.S. environmental initiative since the U.S. Congress applied its pressure via direct statutory enactment (although the same issue is present in less formal interventions.) For purposes of analysis, let us take two separable types of formal, unilateral donor-nation action: first, the Kasten-type appropriations situation where specific directions are given to a country's Executive Director on the Bank board to cast votes or to refrain from voting on particular issues. Second is the further troubling possibility of direct economic threats — the threatened withdrawal of funding to the World Bank tied to conditions of Bank action or inaction on particular loans and particular issues. This second category of pressure, moreover, may be further separated into threats designed merely to withhold extensions or commitments for further funding for the Bank, and a more drastic form of statutory condition cutting off appropriations for previously agreed funding commitments meeting existing Bank quota obligations.

There is a spectrum of arguments to be applied to both categories of unilateral donor pressures on MDBs: at one extreme are the opinions of those members of Congress who attach policy conditions to appropriations bills. Succinctly stated by Senator Kasten's office,[33] it is always the right of a sovereign people to determine how their tax dollars are going to be spent. If the legislature attaches directive conditions to its funding bills, or threatens a cut-off based on a particular policy position, that is an intrinsic right of a democratic people. The office of Senator Steven Symms of Idaho echoes the same position.[34] If World Bank loans in the agricultural and mining sector create Third World competitors for Idaho farmers and mining corporations, it is appropriate for a member of Congress to attempt to limit the effects of World Bank-financed competition through appropriations riders.

As recently as the Foreign Aid Appropriations Act for fiscal 1989, Senator Symms prepared conditional amendments, that stopped short of a retroactive cut-off of committed funds.[35] One amendment provided that if a loan designed to produce debt service revenue was approved by the Bank over the dissent of the American representative, future U.S. commitments of funds to the Bank would be reduced proportionately. No such amendments have passed the Congress, however. (The Treasury de-

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33. Telephone interview with staff member in the office of Senator Robert Kasten (January 4, 1988).

34. Telephone interview with staff member in the office of Senator Steven Symms (November, 4, 1988).

35. *See* Amendment to the Foreign Aid Appropriations Bill for Fiscal 1989, adopted on the Senate floor, 133 CONG. REC. S9270 (daily ed. July 7, 1987) and the debate thereupon (subsequently removed from the statute as passed). The congressional offices make the further point that, since Bank loans are based on borrowing from commercial banks, and not merely upon appropriations granted by member states, the withdrawal of funds is not a direct undercutting of the Bank's lending programs. At the most, it might cause the bond rating of the Bank to drop, requiring higher interest rates, but lending could continue.

partment, which instructs the U.S. MDB representatives, has announced that it views such amendments as violations of international legal commitments and hinted strongly that the agency would argue for a veto in such a case. For its part, the World Bank has made it clear that it would not accept any grant of funds from a member state if such conditions were attached.)

At the other end of the spectrum is the quite skeptical position taken by Dr. Ibrahim Shihata, Vice-President and General Counsel of the World Bank. In his speech to the International Third World Legal Studies Association in Miami,[36] and in memoranda prepared within the Bank in other similar controversies, Dr. Shihata has argued eloquently that all such unilateral threats or suasions applied by donor nations were improper and *contra legem* under international agreements, unless the policy conditions were directly related to the economic integrity of the Bank and its loans to member states. Going back to cases arising in the early 1970's and earlier, Dr. Shihata has argued that both Article IV, section 10 and article V, section 5(c) of the Bank's charter prohibit such direct interference. Article V provides:

> [T]he President, officers and staff of the Bank in the discharge of their offices, owe their duty to the Bank and to no other authority. Each member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any [officers] in the discharge of their duties.

Article IV adds that in the deliberation of the Bank and its officers,

> [O]nly economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article 1 [setting forth the productive development mandate of the World Bank].[37]

Dr. Shihata said these conclusions "clearly indicate that, as a general principle, the Bank, including its Executive Directors, may not take into account political considerations."[38] Based on the articles above, Dr. Shihata has concluded that member [states] of the Bank are under an obligation not to influence the Bank's President and staff in the discharge of their duties, and Executive Directors are under the duty not to act as the instrumentality of member [states] to exert such prohibited influence. However, Dr. Shihata also "recognized that there was no legal sanction available to challenge a vote by an Executive Director which is motivated

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36. This was in conjunction with the AALS annual meeting in Miami Beach, Florida on January 8, 1988. *See* Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 DEN. J. INT'L. L. & POL'Y 39 (1988).

37. *Id.*

38. Prohibitions of Political Activities Under the International Bank of Reconstruction and Development Articles of Agreement and Its Relevance to the Work of the Executive Directors, sec. M87-1409, at 8 (December 23, 1987)(unpublished World Bank document available at World Bank headquarters).

by political considerations."

One fundamental proposition of Dr. Shihata's argument is that constraints like environmental or human rights accounting are political. He specifically recognizes that in some circumstances "there are political situations which have effects on the country's *economy* or on the *feasibility* of project implementation or monitoring which should be taken into account."[39] Insofar as there can be established a direct or indirect link between the environmental consequences of a loan and the ability of the nation to repay it, that economic nexus would justify such "political" intervention. As a general proposition, however, the argument stakes out a strong presumptive position against the propriety and legality of such "political" interference by any member state in the activities of the Board of Directors. Dr. Shihata's position is echoed by the foreign investment committee of the American Branch of the International Law Association. That committee recently released a report strongly condemning efforts by certain signatories of international agreements, specifically the United States as a member of the Multilateral Investment Guarantee Agency (MIGA), attaching statutory conditions to participatory activities under the MIGA international convention.

> The Committee believes that such a unilateral directive to a multilateral economic institution . . . will be unacceptable to the other parties to the Convention. They will question the right of one nation to dictate to the Agency that the nation's [interests] must be protected . . . at the expense of other signatory nations. If these conditions are required, U.S. participation in this multilateral Agency will be barred [sic] and [the Convention] would effectively be destroyed.[40]

Lying somewhere between these two positions is the opinion of several MDB legal counselors who informally expressed a fundamental pragmatism about such donor-nation pressures on international lending. A "whole host of appropriations riders" has been attached to recent U.S. funding statutes, and according to an informal World Bank source, the Bank has implicitly taken the position that such pressure is appropriate since it merely involves guidance to a national representative by its member state. Critical to the middle of the road position lies a modification of Dr. Shihata's fundamental distinction. If indeed the Bank's Executive Directors are legally to be regarded as individuals deriving their authority from and owing their paramount loyalty to the Bank, (Shihata argues) rather than as representatives of their appointive or elective member states, then political pressure exerted upon them is improper and the scope of permissible "economic-linked" political pressure is narrowed concomitantly. The pressures of a particular national special interest undercuts the required dominance of the collective international enterprise.

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39. *Id.*

40. Committee on Foreign Investment (American Branch) International Law Association (chaired by David G. Gill), "Report" (Oct. 15, 1987).

If, on the other hand, one regards and accepts the status of Executive Directors as delegates representing the position of the states that put them on the Board, then many instances of donor-nation pressure upon MDBs become less troublesome, and less destructive of the international agreement underlying the MDB process. Such recognition de-escalates the latent tension represented by an alleged nonfunctional "violation" of international agreement, in effect rationalizing reality.

Political reality indicates that some unilateral pressure on MDBs is inevitable and will take place regardless of whether pressure is formal or informal, direct or indirect, linked to economic concerns or not. The initial choice of an Executive Director is guided to some degree by the character and political predilections of the appointee, and to consider that political communication in this modern age would be limited only to discussions prior to appointment ignores modern international political reality. From this middle perspective, the application of pressure to the appointees of member states, or to the elected representatives of blocks of member states, is perhaps best regarded with a shrug. In any event, the compromise position would note that the donor nation directives are not an attempt to bind the MDB organization as such.

It follows, according to the middle position, that the only case where donor-nation political interference with lending decisions becomes "*contra legem*" is the situation where the prior commitment of a member state to contribute a specified amount of money is unilaterally rescinded in whole or part according to various political conditions. In such a case, a prior binding international agreement is being unilaterally abrogated. In other situations, including conditional refusals to commit further supplementary contributions, a member state is merely exercising its right to contract or to decline to contract. An example of the latter phenomenon occurred when the U.S. Congress passed P.L. 98-191 in November of 1983, with instructions to Executive Directors to refrain completely from voting unless the representatives had consulted with and received approval from appropriate Senate committees. Even this type of continuing stringent condition was arguably proper because it was attached to a resolution agreeing to increase the quota for contribution to the Bank, a financial undertaking that had not been previously agreed to.

Once consent is given it is binding, and unilateral withdrawals or rescissions are not appropriate after a commitment has been made. Short of such action, however, unilateral pressure is as pragmatically acceptable as it is inevitable.[41] "The whole world is political; the whole world is economic"; and it is therefore unrealistic to expect political pressure not to occur. It is possible to argue that most political intervention can be found to be indirectly linked to concerns about the "economic" ability of the

41. *See also*, J. Gold, *The Growing Role of the IMF's Stand-By Arrangement*, 1984 J. Bus. L. 308, 315 (1984).

debtor nation to repay a development loan.[42]

From the pragmatic middle perspective, the further forms of hortatory donor-nation environmental pressure that have been applied to MDBs by Canada, West Germany, the Scandinavian countries and others, are not at all inappropriate. The World Bank is a major actor in the Third World, created and funded primarily by developed Western nations. What happens ecologically, economically, and sociopolitically in the Third World inevitably affects world order and the diverse interests of the developed states.

The most problematic legal situation, then, would be presented by unilateral rescissions of prior existing commitments to the Bank not the bare fact of political pressure on bank lending decisions. Even in such cases, it is true, the Bank has no enforcement mechanism, and it is questionable to what extent it would seek formal legal redress. As so often in international law, the resolution of such controversies would come down to a very basic question of internationalism. If the political actor deems domestic political and legal considerations to be dominant over international commitments, there is no effective constraint except the burden of world opinion - that of member states and the international legal profession. Most states have clearly accepted the doctrines of internationalism in their concept of law. Absent radical domestic political changes, it appears that doctrines of state sovereignty will usually not be applied casually to abrogate international development commitments.

SUMMARY

From the foregoing discussion it can be asserted that large international development projects, like the construction of dams in tropical areas of the Third World, present a wide range of troubling consequences that have often been systematically and disastrously excluded from prior planning efforts and MDB lending procedures. The failure of the international development loan process to review and understand the many serious diseconomies caused by such dam projects is attributable at least in part to completely understandable internal institutional dynamics. An institution that is geared up towards large capital-intensive projects may find it counterproductive and motivationally unattractive to consider reasons for such projects not to be built.

The environmental movement has applied much political pressure upon MDBs over the past decade, largely without success until the mid-

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42. In the case of the Chilean loans, the U.S. government has required its representatives to dissent form development loans so long as the regime continues to violate human rights. Yet, World Bank staffers have generally seemed to take a non-committal position, refusing to condemn this stance officially as a violation of international law or internal Bank Articles. This apathetic attitude may reflect an implicit interpretation of the U.S. pressures as linked to "economic" matters. It may even reflect a more straightforward recognition that major states' representatives will use political considerations and there is nothing the Bank can do about it.

1980's, attempting to reform the lending process that has produced a series of disasters in international water development. In the last two years the World Bank and other MDBs have made major procedural reforms within their internal processes designed to address the problem of environmental diseconomies in their projects. To outward appearances, this major change of heart on the part of the MDBs can be attributed in at least significant part to the pressure applied under NGO prodding by donor nations, including direct unilateral mandates to directors, requiring environmental reviews and standards in the MDB lending process, with the implicit potential for funding threats in the future.

The external pressure of donor nations presents a tangible and persuasive catalyst to the internal reform of MDB institutions. Such pressure, however, raises some questions about the propriety and even legality of the phenomenon, irrespective of the arguably salutary changes it may work in the implementation of international lending. From the perspective of jurists sensitive to the development of international legal norms, it is at least troubling that such a phenomenon has no inherent limits. In the short run, environmental observers will say that important sets of environmental considerations are now being considered where before they might never have been. The health of the planet may thus continue to benefit from the efforts of the 1980's. Debates about the proper relationship between MDBs and individual donor states — and between previously-insulated MDBs and the growing consensus about their broader international responsibilities — are likewise likely to continue into the future.

ARTICLE

Export of Hazardous Waste and Hazardous Technology: Challenge for International Environmental Law*

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I. INTRODUCTION

The hard questions concerning industrial safety raised by the Seveso accident in 1976, the disaster in Bhopal, India, in 1984, and the Chernobyl catastrophe in the spring of 1986, were again pushed to the forefront of public attention in the wake of the Basel fire and chemical spill into the Rhine River in November 1986. The heightened interest and awareness in safety is reflected in Europe, the United States, and the Soviet Union. The subject is of special concern to developing countries which rely upon imported industrial technology to enhance the pace of their economic development.

Notwithstanding recent attempts to address situations involving the import or export of hazardous technology, there still remain unanswered questions. The world community has yet to undertake adequate measures to meet this formidable challenge.

The issue of dumping of hazardous wastes is of even more immediate concern to developing countries. Increased public consciousness of the environment in the developed countries led to the passage of stricter legislation with regard to disposal of hazardous wastes. As a result, producers of these wastes have sought cheaper alternatives to domestic disposal and turned to developing nations as disposal sites. A combination of misinformation and the need for foreign currency has enticed many nations to

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accept such wastes. However, developing nations are reconsidering these policies as a result of public pressures in the developing nations and international public opinion. Additionally, efforts to remove already dumped wastes raise liability questions. Thus, in some ways, the dumping of hazardous wastes involves similar issues to the export of hazardous technologies. This is particularly true when the transfer is from a developed country to a developing country.

This article will explore the considerations that must be taken into account in any international efforts to address the problem. Although the focus in this article is on the export of hazardous technologies, related issues involved in the export of hazardous wastes will also be addressed.

II. THE PROBLEM OF WASTE DUMPING

The current revelations of waste dumping in Africa are distinct from the disasters in Bhopal, Seveso, Chernobyl, and Basel: as of yet, massive environmental damage and loss of life have been avoided (though injuries have been reported by some workers who have come into contact with the substances).[1] However, these incidents are worth noting because they serve as a stimulus to international action to avert potential disasters.

Between September 1987 and May 1988, several ships unloaded cargo from Italy in the small port of Koko, Nigeria. The cargo consisted of hazardous waste packed in steel drums, some of which was reported to be poisonous PCBs and highly radioactive materials.[2] The cargo was "stored" in a vacant lot in a residential area of Koko for approximately $100 a month.[3] Until June, the presence of these materials was undetected by Nigerian newspapers, although it had been reported in the Italian press in March. In June of 1988, reports began appearing in the Nigerian media.[4]

When the presence of the material became publicized, the Nigerian government reacted by jailing one of the Italian partners responsible for importing the waste and demanding that the waste be removed.[5] The Italian government sent experts to Koko and arranged to have the waste removed. The Italian government planned to bill the cost to companies that exported the waste from Italy.[6]

The *Karin B.*, a West German ship, left Koko at the end of July carrying the toxic waste. Protestors prevented the ship from docking in Ravenna, Italy, the source of the alleged exportation. The ship subse-

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1. Brooke, *Waste Dumpers Turning to West Africa*, N.Y. Times, July 17, 1988, at 1, col. 2 [hereinafter cited as *Waste Dumpers*].

2. *Id.*; *Italy Recalls 'Karen B.', Introduces Remedial Steps*, 11 Int'l Env't Rep. (BNA) 469 (Sept. 14, 1988) [hereinafter cited as *Italy Recalls 'Karin B.'*].

3. *Waste Dumpers*, *supra* note 1, at 7, col. 1.

4. *Id.*

5. *Id.*

6. *Italy Recalls 'Karin B.'*, *supra* note 2, at 469-70.

quently was denied permission to dock in Spain, France, the Netherlands, and the United Kingdom. Finally in mid-September, the Italian government reportedly arranged for the ship to dock at an unspecified Italian port in mid-September.[7]

The incident at Koko was not unique. In March 1988, a Norwegian company dumped hazardous waste on a Guinean resort island. When tourists noticed the withering vegetation, it was discovered that the material was incinerator ash from the United States.[8] The government of Guinea imprisoned Norway's Honorary Consul, but the Norwegian company removed the waste by July.[9]

American and European companies also reportedly sought to dispose of hazardous waste by contract with African governments. In several instances, African leaders repudiated these existing contracts when the contracts became public.[10] In some cases, the contracts failed to specify or misrepresented the nature of the waste, while others reportedly contained kickbacks to government officials who approved the contracts. The existence of the contracts became a political issue in most reported cases.[11]

The recent awareness of these incidents produced strong reactions not only in developing nations, but also in developed nations and relevant international agencies. Both Nigeria and Guinea have imprisoned individuals who were determined to have "masterminded" the illegal importation of the wastes.[12] Nigeria even prescribes execution for individuals convicted of illegally importing hazardous waste.[13] Other nations have enacted fines, lengthy imprisonment, and the assessment of removal costs upon individuals convicted of dumping toxic wastes.[14]

Among developed nations, Italy, in September 1988, was considering a decree that would place an embargo on all exports of hazardous wastes to developing countries.[15] The United States Environmental Protection Agency currently enforces a policy of "prior informed consent" and is reportedly seeking approval of a policy allowing the agency to prohibit exports when "they might present a serious risk of harm to the importing

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7. *Id.*

8. *Waste Dumpers*, *supra* note 1; Shabecoff, *Irate and Afraid, Poor Nations Fight Efforts to Use Them as Toxic Dumps*, N.Y. Times, July 5, 1988, at A22, col. 4 [hereinafter cited as *Irate and Afraid*].

9. *Irate and Afraid*, *id.* at A22, col. 4.

10. Brooke, *African Nations Barring Toxic Waste*, N.Y. Times, Sept. 25, 1988, at A8, col. 1 [hereinafter cited as *African Nations Barring Toxic Waste*].

11. *Id.*

12. *Waste Dumpers*, *supra* note 1.

13. *Id.*; *Irate and Afraid*, *supra* note 8; *African Nations Barring Toxic Waste*, *supra* note 10.

14. Gambia, Guinea, Liberia, Togo, Ivory Coast, and Ghana are all reported to have enacted some type of legislation upon the issue. *See African Nations Barring Toxic Waste*, *supra* note 10.

15. *Italy Recalls 'Karin B.'*, *supra* note 2, at 470-71.

country."[16] A bilateral agreement between the U.S. and the importing country may be required as evidence of consent.[17] Other developed nations also are reassessing their export policies concerning hazardous waste.

International organizations also are active in the area. In June 1988, the Organization of African Unity condemned the dumping of waste material in Africa as "a crime against Africa and African people."[18] The European Community ("E.C."), is considering a resolution to implement EC Directive 86/279, calling for prior informed consent and proof of capacity to handle the waste in a safe way by the importing country before export is permitted.[19] In March, 1989, a proposed conference is set for the signing of a convention regulating the shipment of hazardous waste.[20] While work on this convention began before the most recent revelations of dumping of waste in Africa, UNEP has reported increased interest in the convention during the course of 1988.[21] In September 1988, the International Maritime Bureau established a "hotline" to compile information on unregulated dumping of hazardous waste.[22] It is hoped that such a hotline will enable shipowners to examine the background of agents who present potentially hazardous cargo which may be rejected at the destination port.[23]

All of these actions indicate a new awareness of the problems posed by hazardous waste disposal, particularly when the wastes are exported to developing countries which may lack the technology to adequately handle dangerous materials.

III. TRANSNATIONAL RESPONSES TO WASTE DUMPING

Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment is relevant to the issue of export of hazardous wastes. This principle imposes responsibility on states to ensure that activities within their control do not harm the environment of other nations.[24] Greenpeace calls for a total ban on the export of hazardous waste under this principle.[25] However, there are several factors that complicate a blanket ban based on this principle.

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16. *See Irate and Afraid, supra* note 8.

17. *U.S. Would Tie Waste Exports to Bilateral Agreements*, 11 Int'l Env't Rep. (BNA) 472 (Sept. 14, 1988).

18. *Irate and Afraid, supra* note 8.

19. *U.S. Would Tie Wastes Exports to Bilateral Agreements, supra* note 17, at 469.

20. *Id.* at 471-72.

21. *Id.* at 471.

22. *ICC's Maritime [sic] Bureau Establishes Hot Line to Collect Unregulated Waste Dumping Data*, 11 Int'l Env't Rep. (BNA) 473 (Sept. 14, 1988).

23. *Id.*

24. Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF. 48/14 & Corr. 1, *reprinted in* 11 I.L.M. 1416 (1972).

25. *Greenpeace Calls for World Ban on International Traffic in Waste*, 11 Int'l Env't Rep. (BNA) 433-34 (Aug. 19, 1988).

First, it is clear that developing countries do not intend to request such a ban.[26] Instead, developing countries desire fuller disclosure by the exporting nations on the nature and hazards of the waste. They also request transfers of technology to aid in the safe handling of the waste.[27] Developing nations also request that transit nations, through which the waste will pass en route to its destination, should be permitted to prohibit transport of wastes in transit if they deem it unsafe.[28]

Although the need for recourse when the failure to respect established international standards is clear, there is no consensus as to the nature of such recourse. In the recent cases of dumping in Africa, the countries and companies involved resolved the disputes bilaterally and provided reasonably swift clean-up and removal of the hazardous waste. Still, the issue of punishment for scofflaw nations and companies remains.[29] This raises the difficult question of when a state is to be deemed responsible for the actions of its multinational enterprises. This question is especially difficult when the waste may be produced in one state and shipped by a company based in another state aboard a ship owned by a company in a third state. The complexity increases if the waste is shipped through intermediate points, especially if this is done to circumvent regulations of the state of production.[30]

Harmonization of international standards is another issue. Currently, at least two U.N. groups, as well as the Organization for Economic Cooperation and Development ("OECD"), are considering rules concerning hazardous wastes.[31] Harmonization of standards may simplify the regulatory tasks of both exporting and importing nations by standardizing terminology as well as disclosure and handling requirements. In the absence of international standards, corporations are urged to meet the highest national standards.[32] However, if disparate international standards are set, corporations might be tempted to meet only the minimal requirements of an international agreement.

State responsibility in related areas may serve as a reference point with regard to responsibility for export of dangerous technology and hazardous wastes.[33] In *The Corfu Channel Case*,[34] the International Court of

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26. *Supra* note 17, at 471.

27. *Id.* Developing nations probably would not favor the idea of a supranational police force to regulate hazardous waste, as this would be seen as an invasion of their sovereignty. *Id.*

28. *Id.*

29. *Id.* This issue may be addressed by UNEP conferences in November 1988 and March 1989.

30. Fears of such circumvention have deterred the European Community from insisting on a total ban of hazardous waste exports. *Id.* at 469.

31. The U.N. Committee on the Transport of Dangerous Goods and UNEP are reported to be coordinating their work. *Id.* at 492.

32. *Id.* at 493-94.

33. In this sense, responsibility can be said to be generally equivalent to liability. For discussion of state responsibility, *see infra* notes 340-364 and accompanying text.

34. [U.K. v. Albania] 1949 I.C.J. 4 (Judgment of April 9).

Justice affirmed the principle that a state is responsible, under customary international law, for conditions of which it knows, or should know, within its territory, that cause harm to another state. The state must know that such a danger exists,[35] but with respect to export of dangerous technology or hazardous waste, the danger is obvious. If the danger can be treated safely with appropriate methods and technology, and the harm is caused by dereliction of these standards in the importing state, a different situation arises. However, if the exporting state *knew* that the receiving state lacked adequate facilities and technology, fault would lie with the exporting state.[36]

The recent trend seems to be for developed countries to "assure themselves" that appropriate safeguards exist, at least with respect to disposal of hazardous waste. This solution is not satisfactory to developing nations, which may resent such judgments as infringements upon their sovereignty.

A system under which developing countries are fully informed of the risks associated with dangerous technologies/wastes and the importation of appropriate technologies to safeguard against such risks might be more acceptable. While importation of protective technology may indeed incur added expenses, the developing nations could decide for themselves if they should incur such expenses. The intensified awareness of the public to such dangers in both importing and exporting nations also could act as an additional constraint on reckless transfers of dangerous wastes or technologies.

The International Law Commission, in its study on the law of the non-navigational uses of international watercourses, proposed an analogous solution. The provisional articles provide for "equitable and reasonable utilization" of watercourses as well as for exchanges of information on the condition of the watercourse (including future plans which may have an effect on the watercourse).[37] Relating such a system to export of hazardous waste or technologies, an exporting nation could be required to disclose information on the nature and dangers of the waste, as well as to act in a "reasonable" manner. This might include sending technicians to check on the storage techniques as well as providing access to technologies for safely disposing of the waste or employing the hazardous technology.

A recent OECD proposal for its Code of Good Practice suggests that informed consent and cooperation between neighboring nations is an effective way of dealing with the export of hazardous technologies. The group recommends the development of emergency preparedness proce-

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35. *Id.* at 18.

36. This is not to say that some liability would not also arise to the importing state for allowing importation of such technology or waste.

37. *See International Law Commission Takes Key Steps Toward Watercourses Pact*, 11 Int'l Env't Rep. (BNA) 468-69 (Sept. 14, 1988).

dures and response plans. However, the group reached no conclusion on the issues of liability or sanctions against nations which do not comply with the proposed Code.[38]

IV. FACTUAL SETTINGS OF THE RECENT MAJOR ACCIDENTS RELATED TO THE EXPORT OF HAZARDOUS TECHNOLOGY

A. *Seveso, Italy*

On July 10, 1976, an explosion occurred in Meda, Italy at the Icmesa plant owned by Givaudan, a subsidiary of the Swiss-controlled Hoffmann-LaRoche chemical combine. A thick whitish cloud of trichlorophenol gas with a pungent, medicinal odor containing approximately four and one-half pounds of the substance 2, 3, 7, 8 dibenzo-paradioxin, know as TCDD or dioxin, was released into the atmosphere surrounding the plant. A northerly wind moved the cloud to the south over an area some four and one-half miles long and a third of a mile wide before dispersing a half an hour after the initial release.[39] The cloud eventually dispersed as droplets over parts of seven towns. The three most affected towns were Meda, Seveso, and Cesano Maderno.

The Icmesa plant, located about thirteen miles north of Milan, produced mainly trichlorophenol gas, a chemical used primarily to make hexachlorophene, an ingredient in cleansers and germicides, and 2-4-5, a defoliant employed by the American armed forces during the Viet Nam War.[40] On July 10, 1976, for an unknown reason, temperatures within the plant's system rose, causing pressure to build up. Production at the plant usually took place at a temperature of 180 degrees centigrade, while temperatures of 230 degrees centigrade caused the process to go out of control.[41] On that Saturday in 1976, the temperature in the system rose to 300 degrees centigrade, even though the controls were set for cooling. As a consequence of the pressure build-up, a safety valve burst, and the cloud of trichlorophenol gas was released into the atmosphere.[42]

The head of Givaudan, Guy Waldvogel, stated that the plant had two cooling plants built into its security systems, although these may not have been put into action soon enough.[43] As in Bhopal, the Icmesa plant was the subject of safety complaints prior to the accident. These complaints included assertions by plant workers that security measures for handling toxic substances were inadequate and that the plant lacked a dump tank

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38. *Hazardous Installation Measures Adopted by the OECED Member Countries*, 11 Int'l Env't Rep. (BNA) 465 (Sept. 14, 1988).

39. Davis, *Under the Poison Cloud*, N.Y. Times Mag., Oct. 10, 1976, at 20, col. 1 [hereinafter cited as *Poison Cloud*].

40. *Poison Cloud's Effects Still Baffle Italy's Officials*, N.Y. Times, Aug. 13, 1978, at 3, col. 1 [hereinafter cited as *Still Baffle*].

41. *Poison Cloud*, *supra* note 39.

42. *Still Baffle*, *supra* note 40.

43. *Poison Cloud*, *supra* note 39.

or vapor recovery system.[44] This latter defect meant that, once the safety valve burst, the vapors were released directly into the atmosphere.[45] A medical survey of workers at the plant also indicated many that had suffered from nausea and vomiting, burns, blisters, intoxication and vertigo.[46]

The Icmesa plant also exhibited the Bhopal pattern of company management failing to inform local authorities of the type of products being generated during the chemical production processes, the exact nature of the production processes, and the plant's high-risk potential. Initially, plant officials kept quiet about the release, hoping that rain would wash away the pollution. Finally, they informed local authorities twenty-seven hours after the explosion took place.[47] It then took the plant managers seven days to inform local authorities that dioxins were present in the released vapor cloud.[48] This delay occurred in spite of the fact that it involved a substance of which three ounces could injure or kill most of New York City's population.[49] Local authorities magnified these delay errors by taking five days to place some of the areas contaminated by the dioxin off-limits to workers and residents. In addition, the superhighway through the area remained open, and clean-up crews wore their contaminated protective clothing into non-contaminated neighboring areas.[50]

Once the magnitude and nature of the accident were realized by the local authorities, three zones were established around the plant with the most contaminated area designated as Zone A. This zone, which initially encompassed about 285 acres,[51] was sealed off, and the 730 inhabitants were evacuated.[52] The 175 children of the residents living in this zone were sent to state-subsidized summer camps. All agricultural, industrial, and commercial activity in Zone A was halted, including the sale and consumption of locally produced foodstuffs.[53] Zone B, which included about 451 acres, was classified as slightly polluted, and the 4,280 residents were allowed to remain at home, although they were urged to send their children away and pregnant women were asked to submit to medical examinations. A larger area, Zone C, was designated as a safeguard zone where the residents were advised not to eat produce grown in the area.

The accident's immediate human medical effects were primarily in the form of more than 500 cases of chloracne and other forms of skin disease. Some of these cases persisted for more than two years after the

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44. *Id.*; *Still Baffle*, *supra* note 40.

45. Graham, *How Are We Fixed For Toxic Clouds?*, 79 AUDUBON 137, 138 (1977).

46. *Poison Cloud*, *supra* note 39.

47. *Commission Reports on Causes of Seveso, Makes General Suggestions for New Rules*, 1 Int'l Env't Rep. (BNA) 246 (Aug. 10, 1978).

48. *Id.*; *Poison Cloud*, *supra* note 39.

49. *Poison Cloud*, *supra* note 39.

50. Harnik, *The Lessons of Seveso*, 64 SIERRA 77 (1979).

51. *Still Baffle*, *supra* note 40.

52. *Poison Cloud*, *supra* note 39.

53. *Id.*

time of the accident.[54] The most severe biological impact was the loss of produce and domestic animals raised in the contaminated zones, which either died or were destroyed.

The indirect long-term effects of the accident went beyond the physical impacts upon the inhabitants of the three zones. Immediately following the accident, orders for furniture and clothes sold by local merchants were either cancelled or large discounts were demanded.[55] The plant itself was permanently closed a little more than a month after the accident.[56]

Many families and businesses were disrupted as a consequence of the forced evacuation and relocation of residents of the contaminated area. Houses in the most contaminated areas were demolished, while structures left standing had to be decontaminated. Initially, the Italian government allocated $48.4 million to carry out these measures, with most of that money earmarked for decontamination and health projects for affected residents.[57]

The magnitude of the problem is demonstrated by the fact that officials were not sure how to clean up the affected area for months after the accident. Demonstrations by former residents occurred, protesting the slow pace of the government's decontamination program.[58] The basic reclamation plan finally approved by the regional government provided that all vegetation and soil to a depth of one foot from the directly affected areas were to be removed and incinerated at 1,000 degrees centigrade.[59] Once an area had been sufficiently decontaminated to allow human activity again, a research and experimental laboratory to study techniques for neutralizing or reducing the effects of dioxin was constructed. Nearly three years after the accident, data supplied by the laboratory indicated that there was no sign that the toxicity of remaining dioxin-contaminated areas was diminishing.[60]

By the time the decontamination efforts had been largely completed, more than two tons of chemical waste containing dioxin had been removed from the total of 4,400 acres of land which had been contaminated by the Icmesa plant.[61] Even the disposal of this waste was not without mishap, as the 41 drums containing the waste disappeared during their transport out of Italy. The drums were eventually located in a storehouse

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54. *Hoffman-Larouche Chairman Sees End to Threat from Pollution at Seveso*, 1 Int'l Env't Rep. (BNA) 211 (July 10, 1978).

55. *Town in Italy's Toxic Area Misses Children It Sent Away*, N.Y. Times, Aug. 17, 1976, at 6, col. 4; *Poison Cloud*, *supra* note 39.

56. *Polluting Factory in Italy Will Close*, N.Y. Times, Aug. 21, 1976, at 6, col. 3.

57. *Italy Allocates Funds For Gassed Region*, N.Y. Times, Aug. 11, 1976, at 2, col. 4.

58. *Italians Stage Protest at Contaminated Town*, N.Y. Times, Oct. 12, 1976, at 7, col. 1; *Poison Cloud*, *supra* note 39.

59. *Seveso Disaster*, N.Y. Times, Aug. 19, 1976, at 34, col. 1; *Poison Cloud*, *supra* note 39.

60. 2 Int'l Env't Rep. (BNA) 611 (April 11, 1979).

61. *Hoffman-LaRouche Says Dioxin from Seveso Entirely Removed for Disposal Outside Italy*, 5 Int'l Env't Rep. (BNA) 485 (Nov. 10, 1982).

in northern France after considerable public furor.[62] Finally, more than six years after the accident, the Italian government oversaw the dismantling of the Icmesa reactor and the burial of the remaining rubble from the reactor in lead barrels in a 160,000-cubic-meter ditch situated in a corner of the once-highly contaminated sector.[63] A committee of independent scientists reported that, eight years after the accident, no chemical traces of the explosion were visible, except for occasional continuing cases of chloracne. The committee reported that Hoffmann-LaRoche was planning to landscape the affected area into a 40-hectare park.[64]

Hoffmann-Laroche indicated fairly early on that it intended to accept responsibility for the consequences of the explosion and to compensate those damaged by the accident, perhaps partly as a result of the findings of a special parliamentary investigating commission set up by the Italian government. The commission's report, issued one year after the accident, accused the Hoffmann-LaRoche subsidiary, Givaudan, of not only failing to inform the local and regional Italian authorities about the nature of the Icmesa operations, but also of failing to install automatic control and warning devices.[65]

The Italian government and the Lombardy region reached a settlement with Givaudan with regard to compensation for the Seveso accident. Givaudan agreed to pay the governments a total of $80 million for expenses incurred by various Italian ministries, land reclamation, health work, rebuilding in the area, lost crops, and decontamination.[66]

The commune of Seveso filed suit in Geneva, Switzerland against Givaudan in early 1979 for damages to the community and its inhabitants. The suit accused Givaudan of failing to take adequate safety precautions, failing to correct those inadequacies after becoming aware of them, and attempting a cover up after the explosion.[67] Seveso and Givaudan reached a settlement of the suit in late 1983 when Givaudan agreed to pay about $7.2 million to Seveso for damages.[68]

Five Icmesa executives, including the plant's managing director, technical director, plant designer, company chairman, and plant engineer, were brought to trial as a result of the Seveso explosion. The five were charged with negligence leading to a disaster, causing contamination of a

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62. *Dioxin Wastes Still Missing in Europe, Pressure Mounts for Controls on Shipments*, 6 Int'l Env't Rep. (BNA) 194 (May 11, 1983).

63. *Remnants of Icmesa Reactor Demolished, Closing Book on Seveso Explosion, Cleanup*, 7 Int'l Env't Rep. (BNA) 38 (Feb. 8, 1984).

64. *Id.* at 220.

65. *Commission Reports on Causes of Seveso, Makes General Suggestions for New Rules*, 1 Int'l Env't Rep. (BNA) 246 (Aug. 10, 1978).

66. *Figures for Seveso Compensation at Odds with Italian Announcement*, 3 Int'l Env't Rep. (BNA) 242 (June 11, 1980).

67. *Seveso Files Suit in Geneva Court Seeking Damages for Dioxin Disaster*, 2 Int'l Env't Rep. (BNA) 574 (Mar. 10, 1979).

68. *Italian Court Sentences Icmesa Officials for Roles in Explosion at Plant in Seveso*, 6 Int'l Env't Rep. (BNA) 454 (Oct. 12, 1983).

vast inhabited area that had to be evacuated, and failure to have adequate safety systems.[69] The Italian court found the five guilty and assessed sentences ranging from two and one-half to five years in prison.[70] Four of the convictions were overturned on appeal, while the fifth sentence was suspended.[71] Charges against the mayor of Meda and local health officials were initially filed and then later dropped. The charges were based upon the officials' failure to apply existing legislation which could have avoided the disaster.

Two and one-half years after the Seveso accident, Italy, which had virtually no environmental legislation in force during 1976, enacted legislation which reformed its national health care system. Provisions within the new law which had a bearing on environmental hazards caused by harmful substances included standards for the production, registration, sale, and use of chemical substances capable of upsetting the biological and ecological balance; the establishment and maintenance of a national inventory of chemical substances; and the creation of "risk maps" based on a requirement that all factories provide data on the toxicological characteristics of the products they use and their possible effects on humans and the environment.[72]

B. *Bhopal, India*

On the night of December 2-3, 1984, toxic methyl isocyanate (MIC) gas escaped from an underground storage tank at a Union Carbide chemical manufacturing plant in Bhopal, India and leaked into the atmosphere.[73] The gas covered an area of 25 square miles and resulted in an

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69. *Still Baffle*, *supra* note 40; *Dioxin Waste Still Missing in Europe*, *supra* note 62 at 196.

70. *Supra* note 68.

71. *See* Revzin, *Seveso: Ten Years After the Dioxin Leak*, Wall St. J., July 8, 1986, at 36, col. 1.

72. 2 Int'l Env't Rep. (BNA) 506 (Feb. 10, 1979).

73. *See, e.g.*, *The Implications of the Industrial Disaster in Bhopal, India*, Hearing before the House Subcommittee on Asian and Pacific Affairs of the Committee on Foreign Affairs, 98th Cong., 2d Sess., Dec. 12, 1984, at 3, 6 (statement of Robert A. Peck, Deputy Assistant Secretary for Near Eastern and South Asian Affairs, Department of State), and at 28 (statement of Ronald Wishart, Vice President for government relations, Union Carbide Corp.); *Hazardous Air Pollutants*, Hearing before the House Subcommittee on Health and the Environment of the Committee on Energy and Commerce, 98th Cong., 2d Sess., Dec. 14, 1984, at 8 (statement of Warren M. Anderson, CEO of Union Carbide Corp.); *Release of Poison Gases and Other Hazardous Air Pollutants from Chemical Plants*, Joint Hearing before the House Subcommittee on Health and the Environment and the Subcommittee on Commerce, Transportation and Tourism of the Committee on Energy and Commerce, 99th Cong., 1st Sess., March 26, 1985, at 198, 205 (statements by Warren M. Anderson and Jackson B. Browning, President and Vice President for Health, Safety and Environmental Affairs of Union Carbide Corp. respectively regarding possible causes of accident); *Bhopal — What Really Happened?*, BUS. WK. (New Delhi), Feb. 25 - March 10, 1982, at 102; *Bhopal: City of Death*, India Today, Dec. 31, 1984, at 6; Hazarika, *Gas Leak in India Kills at Least 410 in City of Bhopal*, N.Y. Times, Dec. 4, 1984, at A1, col. 6; Diamond, *The Bhopal Disaster: How It Happened*, N.Y. Times, Jan. 28, 1985, at A1, col. 1.

unparalleled catastrophe, causing the death of over 1,600 people and injuring over 200,000 people as a direct result of the leak; several hundred more died in the next few months due to the fatal effects of the lethal gas.[74] Livestock were killed, crops damaged, and businesses interrupted.[75]

In the aftermath of the world's worst industrial accident, medical authorities were uncertain about the long-term effects of exposure to the deadly gas.[76] Two years after the disaster, it was reported that lingering effects on many Bhopal residents included "shortness of breath, eye irritation, and depression."[77] The Indian government reported that the death toll has risen to 2,347 people, that 30,000 to 40,000 people had suffered serious injuries in the incident,[78] and that it had received 500,000 leak-related claims.[79]

The accident occurred at the Bhopal plant of Union Carbide India, Ltd. (UCIL), a subsidiary of the Union Carbide Corp., a New York corporation with headquarters in Danbury, Connecticut, which owns 50.9% of its Indian subsidiary. The Indian government blamed Union Carbide for errors in the design, management, and oversight of the Bhopal plant, and specifically asserted that "unreasonable and highly dangerous and defective plant conditions" caused the catastrophe.[80] It cited inadequate safety measure, faulty alarm systems, storage of huge quantities of toxic chemicals, lack of cooling facilities, and poor maintenance at the factory.[81] The company, on the other hand, contended that the responsibility must lie with its subsidiary along with the state of Madhya Pradesh where the plant was located and the central government of India; it also alleged sabotage by a disgruntled worker at the plant.[82]

In the Bhopal district court where the case was pending, Union Car-

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74. *See, e.g.*, Lewin, *Carbide Is Sued in U.S. by India in Gas Disaster*, N.Y. Times, April 9, 1985, at D2, col. 2; Kramer, *For Bhopal Survivors, Recovery is Agonizing, Illnesses are Insidious*, Wall St. J., April 1, 1985, at 14, col. 2.

75. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 844 (S.D.N.Y. 1986).

76. *See, e.g.*, Sullivan, *Long-Term Effects of Gas Unknown*, N.Y. Times, Dec. 6, 1984, at A10, col. 1; Bishop, *Long-Term Effects Aren't Known of Gas That Killed or Hurt Thousands in India*, Wall St. J., Dec. 6, 1984, at 7, col. 1; Diamond, *Lasting Health Damage Laid to Chemical Leakage in India*, N.Y. Times, Dec. 1, 1985, at 1, col. 2.

77. Miller, *Two Years After Bhopal's Gas Disaster, Lingering Effects Still Plague Its People*, Wall St. J., Dec. 5, 1986, at 30, col. 2.

78. Meier & Miller, *India Plans to Seek At Least $3 Billion From Union Carbide for Bhopal Claims*, Wall St. J., Nov. 24, 1986, at 3, col. 1; Hazarika, *India To Seek At Least $3 Billion From Union Carbide For Bhopal*, N.Y. Times, Nov. 23, 1986, at 10, col. 6.

79. Miller, *supra* note 77, at col. 3.

80. *See id.*; *India Sues Union Carbide in Bhopal; Case Differs Little from One Filed in U.S.*, 9 Int'l Env't Rep. (BNA) 343 (Oct. 8, 1986).

81. *India Sues Union Carbide*, *supra* note 80.

82. *See* Miller, *supra* note 77; Diamond, *Carbide Gives Details on Its Sabotage Claim*, N.Y. Times, Nov. 18, 1986, at 29, col. 1; Weisman & Hazarika, *Theory of Bhopal Sabotage Is Offered*, N.Y. Times, June 23, 1987, at 6, col. 1. In its response in the Bhopal court to the Indian government suit against it, Union Carbide said that its subsidiary and the Indian government had the key roles in operating and overseeing the plant. *Id.*

bide contended that, although it owned 50.9% of the stock in its subsidiary, the government of India had barred it from running the plant. Instead, it said that "it sold general design drawings to its Indian subsidiary, which then hired companies to do detailed design and construction. The parent trained some of the plant managers, but was unable to dictate the plant's daily operations."[83] It added that the 1973 agreement for the sale of the design, approved by the Indian government, stipulated that the parent "shall not, in any way be liable for any loss, damage, personal injury, or death" resulting from the use of the design specifications by the UCIL.[84] The company also contended that "the Indian government had approved and inspected the plant, knew about the dangers of MIC, and refused to allow American employees from Carbide to remain in India to provide technical assistance requested by its subsidiary to the Indians running the plant. . . . [T]he state government in Bhopal had allowed people to move close to the plant, hence knowing the dangers they would face in an accident."[85] Earlier, in a federal district court in New York, similar charges and countercharges regarding the responsibility for the design of the plant, overall control, and training of the personnel were exchanged by the government of India and Union Carbide.[86]

Questions have been raised about the safety of the plant design in Bhopal, which went into production in 1980,[87] and the adequacy of safety equipment and operating systems.[88] None of the safety devices worked.[89] Because of instrumentation errors, monitoring gauges did not work, and hence there was no early warning of the impending disaster. The mechanical valves which were supposed to act as a backstop measure were dysfunctional. Also, the vent gas scrubber (VGS) intended to neutralize any leaking gas by automatically "washing" the toxic gas with caustic soap, thereby rendering it harmless, was shut off when the leak occurred. The flair tower designed to burn leaking gas had also been shut down. However, according to one report, "because of faulty design, both the VGS and flair tower together also could not have prevented the MIC from escaping into the atmosphere."[90] As evidence of the faults in the plant design, it was reported that there was no backup system to prevent this

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83. *See* Diamond, *supra* note 82.

84. *Id.*

85. *Id.* at 29, col. 2.

86. *See In re* Union Carbide Corp., *supra* note 75, 634 F. Supp. at 855-59. *See also* Adler, *Carbide Plays "Hardball"*, AM. LAW., Nov. 1985, at 27, 58; *Discrepancies Are Seen in Bhopal Court Papers*, N.Y. Times, Jan. 3, 1986, at D3, col. 2.

87. *See Pesticide Plant Started as a Showpiece But Ran Into Troubles*, N.Y. Times, Feb. 3, 1985, at 8, col. 4.

88. On these issues, we have relied extensively on Professor Nanda's remarks at the April, 1985, meeting of the American Society of International Law. *See* 1985 PROC. AM. SOC'Y INT'L L. 304-310 (1987).

89. *See Bhopal — What Really Happened?*, *supra* note 73, at 104-105; *Bhopal: City of Death*, *supra* note 73, at 8-10.

90. *Bhopal — What Really Happened?*, *supra* note 73, at 105.

kind of gas escape. Safety measures used elsewhere by Union Carbide were lacking; for example, the UCIL plant lacked the computerized pressure/temperature sensing system, and there were no effective alternatives. A study of the design analysis of the storage area for MIC led one reporter to two conclusions:

> First, that the short-sighted design modification made in the pipeline connections, less than a year ago, along with the dysfunctioning of some valves, were primarily responsible for water ingress in the MIC tank. And, second, the original design of the MIC storage area did not provide even a single, safe route for a toxic gas at a very high temperature and pressure to be neutralized before escaping into the atmosphere. In other words, the safety features were greatly underdesigned.[91]

Following the Bhopal disaster, several claims on behalf of the victims were filed in India as well as in the United States,[92] raising questions about the possible violations of Indian law which prohibits solicitation of clients and contingency fees.[93] Meanwhile, on February 20, the Indian government adopted the Bhopal Gas Leak Disaster Ordinance and, on March 29, 1985, enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act,[94] under which the government of India assumed responsibility as the sole representative of all the victims of the gas leak to bring a single action against Union Carbide. Subsequently, in April 1985 the Indian government, on behalf of the victims, filed as *parens patriae* a lawsuit against Union Carbide in the federal district court for the Southern District of New York, seeking both compensatory and punitive damages in an unspecified amount.[95] Before filing the suit, which invoked six, separate theories of liability on the part of Union Carbide — absolute liability, strict liability, negligence, breach of warranty, misrepresentation, and the multinational enterprise liability theory —[96] the government of India had rejected a Union Carbide offer to settle the controversy for $200 million dollars.[97]

Two U.S. lawyers challenged the Indian government's action of filing a lawsuit on behalf of all the victims by in turn filing a suit in India.[98] The challenge to block the Indian suit in the United States was based on

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91. *Id.* at 104.

92. *See* Stevens, *U.S. Lawyers Are Arriving To Prepare Big Damage Suits*, N.Y. Times, Dec. 12, 1984, at A10, col. 1; Galanter, *Legal Torpor: Why So Little Has Happened In India After the Bhopal Tragedy*, 20 TEX. INT'L L.J. 273, 290 (1985).

93. *See* Galanter, *supra* note 92, at 278, 290.

94. Bhopal Gas Leak Disaster Ordinance, No. 1 of 1985, Feb. 20, 1985. The text of the March 29, 1985 Act, *reprinted in* 25 I.L.M. 884 (1986).

95. *See* Galanter, *supra* note 92, at 286; Riley, *Bhopal: The Legal Escalation Begins In Earnest*, Nat'l L. J., April 22, 1985, at 8, col. 1; Lewin, *Carbide Is Sued In U.S. By India In Gas Disaster*, N.Y. Times, April 9, 1985, at A1, col. 5.

96. *See* Riley, *supra* note 95.

97. *See* Galanter, *supra* note 92, at 285.

98. *See* Riley, *supra* note 95, at 8, col. 3.

the alleged violations by the Indian government's legislation of the right of Indian citizens under the Constitution of India to choose their own counsel and, on the contention that if the Indian government also shared the responsibility for the disaster by failing to enforce safety regulations, it could not represent the victims because of a conflict of interest.[99]

The Judicial Panel on Multidistrict Litigation consolidated all the lawsuits brought in the United States in federal district court in the Southern District of New York.[100] A year after the suit was brought, District Judge Keenan dismissed the case on the grounds of forum non conveniens under three conditions: one, that Union Carbide consent to submit to the jurisdiction of the court of India and continue to waive defenses based upon the statute of limitations; two, that Union Carbide agree to satisfy any judgment rendered against it by an Indian court, provided that the minimal requirements of due process are met; and three, that Union Carbide comply with U.S. rules on discovery under the federal rules of civil procedure.[101]

Earlier efforts at a negotiated settlement were unsuccessful when the Indian government rejected a Union Carbide offer of $350 million dollars, which with interest would have accrued to $500-600 million and which was accepted by lawyers representing private plaintiffs in litigation.[102] Union Carbide appealed the judge's ruling contending that the Indian government must also be bound by U.S.-style discovery rules.[103] Attorneys for the individual plaintiffs in the Bhopal case also appealed the ruling by Judge Keenan that sent the proceedings to India.[104] Subsequently, on September 5, 1986, the Indian government sued Union Carbide in the Bhopal district court in India for damages arising out of the gas leak.[105] The Indian government sought at least $3 billion from Union Carbide Corp. in claims arising from the disaster.[106] In January 1987, the Second Circuit Court of Appeals reversed the Federal District Court and held that both Union Carbide and the Indian government must have equal access to evidence and granted Union Carbide U.S.-style discovery powers as well.[107] At the end of November 1987, all ongoing efforts to

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99. *See* Lewin, *supra* note 95, at D2, col. 4.

100. *See* Cates, *Hundred Lawyers Start Legal Cleanup*, Nat'l L. J., April 29, 1985, at 13, col. 1.

101. *In re* Union Carbide Corp., *supra* note 75, at 867.

102. *See India Refuses*, 9 Int'l Env't Rep. (BNA) 107 (April 9, 1986). The Indian government claims that it represents all victims of the disaster, based on the doctrine of *in parens patriae*, and on retainers executed by 487,000. *Id.* at col. 2.

103. *See* N.Y. Times, July 11, 1986, at 27, col. 6.

104. *See Plaintiffs' Attorneys in Bhopal Case Appeal Transfer of Proceedings to India*, 9 Int'l Env't Rep. (BNA) 313 (Sept. 10, 1986).

105. *Supra* note 81.

106. *See* Hazarika, *supra* note 73; Meier & Miller, *supra* note 78.

107. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 809 F.2d 195 (2d Cir. 1987); Meir, *Union Carbide Gets Equal Access to Bhopal Data*, Wall St. J., Jan. 15, 1987, at 16, col. 1; Defries, *The Role of Environment in the Development Process*, 11 INT'L BUS. LAW. 52 (1983).

reach a negotiated settlement between the government of India and Union Carbide[108] had stalled,[109] and the Indian government filed criminal charges of culpable homicide in Bhopal against Union Carbide.[110]

Subsequently, on December 17, 1987, Judge M. W. Deo of the Bhopal District Court ordered Union Carbide to pay $270 million in interim relief to the victims of the accident.[111] On review, the State high court ruled that an interim payment of $193 million be paid.[112] On further appeal, India's highest court, the Supreme Court of India, urged the Indian government and Union Carbide to settle their protracted legal dispute.[113] The Bhopal tragedy created momentum to seek appropriate international, regional, and national action to provide proper export safeguards for hazardous substances and technologies and effective international assistance in establishing standards and in providing guidance to developing countries.

C. *Chernobyl, U.S.S.R.*

On April 26, 1986, a chemical explosion resulting in a meltdown occurred in one of the four reactors of the Chernobyl nuclear power plant near Kiev in the Soviet Union, causing in the destruction of the core of the reactor.[114] The Soviet authorities were slow both in notifying Soviet citizens likely to be affected by the accident and in revealing the details of the accident in the graphite-moderated reactor.[115]

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108. *See, e.g.*, Hazarika, *Carbide and India Strive for Bhopal Fund Accord*, N.Y. Times, Nov. 19, 1987, at 32, col. 1; *id.*, Nov. 18, 1987, at 31, col. 1.

109. *See* Wall St. J., Nov. 30, 1987, at 4, col. 1.

110. *See* N.Y. Times, Dec. 2, 1987, at 44, col. 1. On the litigation aspects of the case, *see* Nanda, *For Whom the Bell Tolls in the Aftermath of the Bhopal Tragedy: Some Reflections on Forum Non Conveniens and Alternative Methods of Resolving the Bhopal Dispute*, 15 DEN. J. INT'L L. & POL'Y 235 (1987).

111. *Indian Judge Orders Union Carbide to Pay*, 11 Int'l Env't Rep. (BNA) 3 (Jan. 13, 1988).

112. *Union Carbide Says Bhopal Judge Biased*, 11 Int'l Env't Rep. (BNA) 270 (May 11, 1988).

113. *See* N.Y. Times, Nov. 2, 1988, at C2, col. 1. On finding a solution, see Nanda, *supra* note 110, at 251-54; Magraw, *The Bhopal Disaster: Structuring a Solution*, 57 U. COLO. L. REV. 835, 837-46; McCaffrey, *Accidents Do Happen: Hazardous Technology and International Tort Litigation*, 1 TRANSNAT'L LAW. 41, 83-84 (1988). Pursuant to the order of the Supreme Court of India, Union Carbide paid $470 million to settle the case. *See* N.Y. Times, Feb. 25, 1989, at 19, col. 3.

114. *See* International Nuclear Safety Advisory Group, Summary Report on the Post-Accident Review Meeting on the Chernobyl Accident 1 (Safety Series No. 75 - INSAG - 1, IAEA 1986) [hereinafter cited as IAEA Summary Report].

115. *See* Bohlen, *During Days of Delay, Children Played in Chernobyl's Dust*, Wash. Post Weekly Ed., June 22, 1987, at 19, col. 1; *Some Facts on Chernobyl Revealed*, 9 Int'l Env't Rep. (BNA) 139-40 (May 14, 1986); Sullivan, *Calamity Highlights Old Reactor-Design Debate*, N.Y. Times, May 1, 1986, at A11, cols. 1-3; Diamond, *Reactor Fallout is Said to Match Past World Total*, *id.*, Sept. 23, 1986, at A1, col. 1; [hereinafter cited as *Reactor Fallout*]; Diamond, *Long-Term Fallout: Comparison to Bombs Altered*, *id.*, Nov. 4, 1986, at 22, cols. 1-6. [hereinafter cited as *Long-Term Fallout*]; Ibrahim, *Soviet View on Lessons From Chernobyl Points Up Obstacles the West Now Face*, Wall St. J., Oct. 2, 1986, at 30,

According to the Soviet experts who reported at a special review meeting convened by the International Atomic Energy Agency in Vienna in August 1986, the accident was caused by a series of "willful violations" of operating procedures and human errors.[116] The triggering event was a special electrical systems test designed "to demonstrate improvement in the capacity of the turbine generators to support essential systems during a major station blackout."[117]

A report prepared by nuclear safety experts said that the runaway reaction, "an event considered to have an extremely low probability," was caused by special design characteristics of the reactor, coupled with purposeful violations of operating rules including the decision not to shut down the reactor.[118] Eventually when the shift foreman ordered the shut down of the reactor, it was too late. Within the next four seconds, the reactor "power was calculated to have reached 100 times full power . . . [which] resulted in fuel fragmentation, rapid generation of steam and ultimate destruction of the reactor core and associated structures."[119] Thirty-one people, all of whom were power plant personnel or firemen, died while over 200 suffered from symptoms of acute radiation syndrome, and 135,000 people were evacuated from several population centers within a radius of 30 kilometers around the power station.[120]

Reporting to the U.S. Senate Committee on Labor and Human Resources on the cleanup effort by the Soviet Union following the Chernobyl accident, Yevgeny P. Velikhov, a vice president of the Soviet Academy of Sciences and Chairman of the Energy Committee of the Supreme Soviet, said that tens of thousands of workers had "decontaminated 60,000 buildings in 500 villages," and had "built a special concrete wall in the soil to separate the groundwater from possible penetration into the river. This concrete wall surrounded all of the nuclear power station and had a depth of 15 meters."[121] He added that they had carted off radioactive topsoil from an area of several square miles and had built thousands of new houses and hundreds of social and supporting facilities for those evacuated from the area.[122]

While Dr. Velikhov predicted a "quite small" increase in cancer

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cols. 1-2; Boffey, *Panel Hears a Russian on Chernobyl*, N.Y. Times, Jan. 21, 1987, at 3, cols. 1-3.

116. *See* IAEA Summary Report, *supra* note 114, at 9, 17-30.

117. *Id.* at 15.

118. *See id.* at 13. *See also Reactor Fallout*, *supra* note 115, at 24, cols. 3-6; Boffey, *supra* note 115, at col. 3; *Russian Roulette at Chernobyl*, THE ECONOMIST, Aug. 30, 1986, at 75, col. 1.

119. IAEA Summary Report, *supra* note 114, at 25.

120. *See id.* at 6.

121. *See Reviewing the Causes and Consequences of the Chernobyl Nuclear Powerplant Incident, Hearing before the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess., at 3, 12 (Jan. 20, 1987).

122. *Id.* at 14.

deaths in the future because of radioactive releases,[123] other experts have predicted that thousands of cancer deaths in the future could be attributed to radioactive fallout from the Chernobyl accident.[124]

As a consequence of the accident, the Soviet Union either dismissed from their jobs or otherwise penalized at least twelve top officials.[125] The head of the nuclear power industry at the time of the accident was expelled from the Communist Party, while the director of the plant and two assistants were sentenced to prison terms of ten years each for criminal negligence as a result of the accident.[126]

The radiation fallout from the accident caused considerable concern and damage in many European countries. Initially, increased radiation levels were detected in the Scandinavian countries, but, because of shifting winds, several other European countries were also affected.[127] A Polish report to the International Atomic Energy Agency noted that radiation was detected as early as late April 27, and the authorities who began sampling the air, food, and the environment on April 29 found some milk from northeastern Poland contaminated.[128] The government took preventive actions, including the imposition of a ban on the pasturing of cows or feeding them fresh fodder, forbidding children in some regions to drink milk and giving them doses of iodine.[129]

In France, on May 1-3, radiation levels rose to as high as 400 times those normally recorded.[130] The authorities observed increases in the radioactivity of fruits and vegetables in eastern France; however, with the exception of the confiscation of a shipment of Alsatian spinach, there was no national intervention in the sales of French agricultural products.[131] In Greece, radiation levels were found to be 20 to 40 times higher than normal.[132] In the United Kingdom, the public was warned to avoid drinking rainwater in some areas of the country following the detection of the radioactive cloud on the Kent Coast on May 2.[133] On May 8, radiation levels

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123. *Id.* at 30.

124. *See* Boffey, *supra* note 115, at cols. 2-3; *Reactor Fallout*, *supra* note 115; *Long-Term Fallout*, *supra* note 115; *The Chernobyl Toll*, Wash. Post Weekly Edition, March 9, 1987, at 38, col. 4.

125. *Head of Soviet Atom Power Plants and 5 Others Penalized by Party*, N.Y. Times, Aug. 15, 1986, at 4, col. 5.

126. *Id. See also* Bohlen, *Dead Forests and a Ghost Town Are Chernobyl's Neighbors*, Wash. Post Weekly Ed., July 6, 1987, at 17, col. 1.

127. *E.g.*, N.Y. Times, May 6, 1986, at A6, col. 3.

128. *See Some Facts on Chernobyl Revealed*, 9 Int'l Env't Rep. (BNA) 140 (May 14, 1986).

129. *Id.*

130. *Government Withholds information, Then Says Radiation Levels Not Serious*, 9 Int'l Env't Rep. (BNA) 188 (June 11, 1986).

131. *Id.*

132. *Supra* note 128.

133. *EEC Lifts Ban on East European Food Imports, Substitutes U.S. Limits on Radiation Levels*, 9 Int'l Env't Rep. (BNA) 189 (June 11, 1986); *Radioactive Fallout From Chernobyl Will Kill 40 UK Residents, Board Says*, 9 Int'l. Env't Rep. (BNA) 353 (Oct. 8,

in Scotland were reported as "the highest they [had] ever been."[134] Radiation levels remained high in parts of England, Wales, and Scotland, and tough restrictions on the movement and slaughter of livestock were reintroduced for several hillfarms in Scotland in August 1987.[135] Similarly, significant increases in radiation levels were detected in Finland,[136] Italy,[137] Ireland,[138] and West Germany,[139] while some iodine 131 was detected in rainwater samples in the United States, and the State of Oregon advised people not to drink rainwater.[140]

The Swiss government banned fishing in Lake Lugano because of an unacceptable level of radiation in fish there[141] and decided to indemnify Swiss fishermen for any loss of income they suffered as a result of the government ban.[142] The West German government took 5,000 tons of powdered milk out of circulation due to the fact that the milk contained sixteen times the maximum level of radiation permitted for humans.[143] Subsequent attempts to sell the milk to Egypt ended when the West German government impounded the milk.[144]

Because of the increased levels of radiation found in food imports from the Soviet Union and the East European countries — Hungary, Czechoslovakia, Romania, Bulgaria, Poland, and Yugoslavia — the European Community imposed a temporary ban on such imports, which was lifted on June 1, 1986.[145] On that day, the Community imposed U.S. equivalent, strict limits on radiation levels for imported food products from all countries,[146] and on September 30, 1986, extended those limits for another five months.[147]

Several consumer groups and environmental organizations accused the European governments of not providing the public with the needed

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1986).

134. *EEC Lifts Ban*, *supra* note 133 at 189.

135. *See Radiation Levels From Chernobyl Prompt Limits on Livestock Slaughter, Movement*, 10 Int'l Env't Rep. (BNA) 442 (Sept. 9, 1987).

136. *See Effects of Chernobyl in Finland*, 9 Int'l Env't Rep. (BNA) 420 (Nov. 12, 1986).

137. *See* Salter, *Living With Fallout*, ATLANTIC, Jan. 1987, at 30.

138. *See Excess Radioactivity Found in Birds that Fly Through Chernobyl Contamination*, 9 Int'l Env't Rep. (BNA) 456 (Dec. 10, 1986).

139. *See Effects of Chernobyl Accident in April Still Felt Four Months Later in Germany*, 9 Int'l Env't Rep. (BNA) 272-73 (Aug. 13, 1986).

140. *No U.S. Effects Seen*, 9 Int'l Env't Rep. (BNA) 140 (May 14, 1986).

141. *See Ban Imposed on Fishing in Lake Lugano After High Levels of Radioactivity Found*, 9 Int'l Env't Rep. (BNA) 366 (Oct. 8, 1986).

142. *Id.* For a report on the effects on the Lapps whose reindeer have been contaminated, see Clines, *Chernobyl Shakes Reindeer Culture of Lapps*, N.Y. Times, Sept. 14, 1986, at A1, col. 2; A20, col. 4.

143. *See Federal Government Takes Over Problem of Disposing of Radioactive Milk Powder*, 10 Int'l Env't Rep. (BNA) 58 (Feb. 11, 1987); Tagliabue, *Keeping Tainted Foods Off Third World Shelves*, N.Y. Times, Feb. 8, 1987, at 2, col. 3.

144. Tagliabue, *supra* note 143.

145. *See EEC Lifts Ban*, *supra* note 133.

146. *Id.*

147. *See supra* note 141.

information and not taking prompt action. For example, a Brussels-based consumer group which represents consumers in all EEC countries criticized many European countries, especially France and Belgium, for not showing adequate concern. According to the report issued by the group, "[i]t is significant that those countries with the highest dependence on nuclear power tend to do the least."[148]

The report added that French authorities had "created a situation of silence and ignorance,"[149] the Benelux countries (Belgium, the Netherlands, and Luxembourg) showed "the least concern" and that Italy and Belgium had allowed economic consideration to influence their decisions.[150] Similarly, a coalition of environmental organizations called upon the EEC Commission to propose an amendment to the Seveso Directive — the Council Directive on Major Accident Hazards of Certain Industrial Activities[151] — to cover nuclear reactors as well, for "[t]here is no reason to exclude nuclear power plants any longer from the scope of the post-Seveso Directive."[152] They also called for the immediate closure of thirty-one "potential Chernobyls" within the European Community.[153]

In response to the damage caused by the radiation, the 518 member European Parliament adopted a resolution asking the EEC Council of Ministers to calculate losses to community farms whose contaminated products had to be destroyed and to claim damages from the Soviet Union, which the Parliament rebuked for failing to give timely and adequate information.[154] The parliament also appealed for common standards of design and operation of nuclear power plants, for the creation of an international safety inspectorate, and for the establishment of maximum doses of radiation in food products such as milk and vegetables.[155]

Among the responses of international organizations, the World Health Organization (WHO) was concerned with setting guidelines for countries affected by radiation,[156] while the United Nations Environment Program (UNEP) was primarily interested in the establishment of an international monitoring network.[157] Prevention and mitigation of the con-

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148. *Limits on Radioactivity in Foodstuffs to be Proposed*, 9 Int'l Env't Rep. (BNA) 272 (Aug. 13, 1986); *see also How the Atom Splits Europe*, THE ECONOMIST, Sept. 13, 1986, at 41, col. 1; Lewis, *Europe After Chernobyl: Cooler Attitudes Toward Nuclear Power*, N.Y. Times, April 27, 1987, at 6, col. 1.

149. *See Limits on Radioactivity in Foodstuffs to be Proposed*, 9 Int'l Env't Rep. (BNA) 272 (Aug. 13, 1986).

150. *Id.*

151. *See EEB Calls for Immediate Closure*, 9 Int'l Env't Rep. (BNA) 180 (June 11, 1986).

152. *See id.*

153. *Id.*

154. *See id.* at 179. *See also* OECD, *The Accident at Chernobyl — Economic Damage and Its Compensation in Europe*, 39 NUCLEAR L. BULL. 58 (June 1987).

155. *See Chernobyl Blast Triggers Debate*, 9 Int'l Env't Rep. (BNA) 179 (June 11, 1986).

156. *Some Facts on Chernobyl Revealed*, 9 Int'l Env't Rep. (BNA) 139 (May 14, 1986).

157. *Id.*

sequences of a nuclear power plant accident were of primary concern to the Vienna-based International Atomic Energy Agency (IAEA). Beginning in May 1986, when a special session of the Board of Governors of IAEA met in Vienna and deliberated on these issues,[158] IAEA's activities included the adoption by consensus at a special General Conference Session in September 1986 of two international conventions to strengthen international cooperation in nuclear safety and environmental protection.[159] In November of 1986, the IAEA's expert group of 173 persons from 48 countries undertook a week-long review of its safety programs.[160] The group called for strengthening existing IAEA standards of nuclear safety, including its nuclear incident reporting system.[161] It noted a need for additional IAEA guidance on fire protection at nuclear facilities and on procedures for mandatory tests on nuclear power reactors.[162]

The Standing Committee on Civil Liability of Nuclear Damage of the IAEA, meeting in March 1987, proposed that the existing international nuclear liability regimes established by the Paris Convention of 1960 and the Vienna Convention of 1963 be enlarged through the adoption of Joint Protocols to both conventions.[163]

A notable proposal of the European Community Commission for a Council Decision was offered on August 20, 1986, on "Community System Rapid Exchange of Information in Cases of Unusually High Levels of Radioactivity or of a Nuclear Accident."[164] Subsequently, in April 1987, the Commission presented to the Council a proposed Council Decision on the subject,[165] under which the government concerned would immediately inform the Commission and other member states "of the details of the accident and other data such as meteorological conditions, radioactivity levels in foodstuffs, measures taken to protect the public, and predicted behavior of the release over time."[166]

In the wake of the Chernobyl accident, while serious questions have been raised on the future of nuclear energy,[167] special efforts are being undertaken for sharing nuclear safety information and for the establishment of an adequate framework for coordinated international response to

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158. For a summary of the decisions taken by the Board at that meeting, see 25 I.L.M. 1009 (1986).

159. For a summary report, see *IAEA Conventions on Nuclear Safety Provide For Cooperation in Wake of Nuclear Accident*, 23 UN CHRONICLE, No. 5, Nov. 1986, at 74.

160. *See Atomic Energy Agency*, 9 Int'l Env't Rep. (BNA) 410 (Nov. 12, 1986).

161. *Id.*

162. *Id.*

163. 39 NUCLEAR L. BULL. 31 (June 1987).

164. COM (86) 434 Final, 20 Aug. 1986, *reprinted in European Community Commission Proposal*, 9 Int'l Env't Rep. (BNA) 377 (Oct. 8, 1986).

165. *See* 39 NUCLEAR L. BULL. 33 (June 1987).

166. *Id.*

167. *See, e.g.*, the report that even the European Community's energy ministers were unable to agree over the role of nuclear power in Europe in *Ministers Disagree*, 9 Int'l Env't Rep. (BNA) 180 (June 11, 1986).

a nuclear accident.[168]

D. *Basel, Switzerland*

Ten years after the Seveso accident, a major toxic chemical spill occurred in Europe during efforts to put out a fire at a chemical storage warehouse of Sandoz, a major Swiss chemical multinational in Basel. The spill, which occured November 1, 1986, resulted in a huge discharge of toxic chemicals into the Rhine.[169] While Swiss authorities initially reported that thirty tons of chemicals, including herbicides, pesticides and poisonous mercury, leaked into the Rhine,[170] some French reports put the figure of the spilled chemicals as high as 1,000 tons.[171] Eventually, Sandoz announced that much of the 1,246 tons of material inside the warehouse, including 824 tons of insecticide, 71 tons of herbicide, 39 tons of fungicide, 4 tons of solvents, and 12 tons of organic compounds containing mercury, was washed into the river by the water used by the firemen in putting out the fire.[172]

The worst accident of this kind since Seveso caused ecological disaster, adversely affecting France, Germany, and the Netherlands, in addition to Switzerland.[173] Subsequent reports said that Basel escaped a major environmental disaster "by a whisker," for the city could have been impacted by toxic fumes if the fire had burned longer.[174] Former West German Chancellor, Willy Brandt, referred to Basel as "Bhopal on the Rhine,"[175] and some political parties started calling it "Baselpal,"[176] while the French and West German press renamed the city "Chernobasel," or "Chernobale."[177] On the evening of November 1, 2,000 demonstrators

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168. For a recent U.S. report on international response to nuclear power safety concerns, see U.S. GAO/NSIAD - 85 - 128 (1986).

169. For reports, see, *e.g.*, Roth, *Swiss Accident That Polluted the Rhine May Have Heaviest Impact in Germany*, Wall St. J., Nov. 11, 1986, at 41, col. 2; Lewis, *Chemical Spill in Rhine Affects Four Countries*, N.Y. Times, Nov. 11, 1986, at 1, col. 2; Netter, *Anger Along the Rhine Grows After Chemical Spill*, *id.*, Nov. 12, 1986, at 7, col. 3. [hereinafter cited as *Anger Along the Rhine*]; Studer, *Swiss Never Thought Sandoz Disaster Could Happen in Their Orderly World*, Wall St. J., Nov. 13, 1986, at 33, col. 2; Netter, *Fourth Swiss Chemical Accident Sends a Cloud Over City of Basel*, N.Y. Times, Nov. 21, 1986, at 4, col. 1 [hereinafter cited as *Fourth Swiss Chemical Accident*]; Netter, *Swiss Look to Tighter Regulation After Spill*, *id.*, Nov. 23, 1986, at A5, col. 1 [hereinafter cited as *Swiss Regulations*]; *French, Germans Complain About Notice*, 9 Int'l Env't Rep. (BNA) at 389-90 (Nov. 12, 1986); 9 Int'l Env't Rep. (BNA) at 429-41 (Dec. 10, 1986).; 10 Int'l Env't Rep. (BNA) 3-7 (Jan. 14, 1987).

170. *See* Roth, *supra* note 169; Tagliabue, *The Rhine Struggles to Survive*, N.Y. Times, Feb. 15, 1987, at F4, col. 3.

171. *See* Lewis, *supra* note 169.

172. *See Radical Measures*, 9 Int'l Env't Rep. (BNA) 429, 430 (Dec. 10, 1986).

173. *See* Lewis, *supra* note 169, at 1, col. 2; 4, cols. 3-4; *Anger Along the Rhine*, *supra* note 169.

174. *See Independent Reports*, 10 Int'l Env't Rep. (BNA) 102 (Mar. 11, 1987).

175. *See supra* note 172.

176. *Id.*

177. *See Anger Along the Rhine*, *supra* note 169, at 7, col. 3.

marched through the streets of Basel carrying banners which read, "Seveso-Bhopal-Schweizerhalle." [178] Schweizerhalle is the Basel suburb where the Sandoz plant is located. Subsequently, it was revealed that several more incidents of chemical spills in the Rhine immediately preceding and in the few weeks following the Basel spill had occurred which also involved other Swiss chemical giants such as CIBA-Giegy, though reportedly none was as serious as the Sandoz spill.[179]

The Sandoz spill and those other incidents of chemical spills in the Rhine caused a great deal of concern in Europe. Questions raised included those of adequate notification, safety standards, violation of pollution control laws, as well as liability and compensation.[180] Calls were made for European Community action and for international cooperation to prevent such pollution.[181] The Netherlands representative told a special meeting of environment ministers from the states bordering the Rhine, convened in Zurich on November 12, 1986, that, following the accident, it had already spent a quarter of a million dollars on pollution control.[182]

On December 19, 1986, the French Environment Minister presented the Swiss government with a bill for $38 million for damages to French interests arising from the spill.[183] The figure of $38 million was estimated by an independent commission of French experts based upon short-term damages to the fishing and boating industries; medium-term damages, including the cost to restore the ecosystem; and potential damages, including the cost of building dams and other facilities linked to the Rhine, such as a water pumping system, assuming that no significant pollution of the groundwater aquifer had occurred.[184] The Swiss government and the Sandoz and CIBA-Geigy officials showed their willingness to settle claims for damages, although it was not clear who was to assume responsibility for how much of the claimed damages.[185] Subsequently, Sandoz paid damages to French fishermen[186] and to the French government.[187] Among other developments at Sandoz, safety rules related to the storage of toxic and flammable substances in the Sandoz group of companies were strengthened; Sandoz also set up the "Sandoz Rhine Fund" to help repair

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178. *See French, Germans Complain about Notice*, 9 Int'l Env't Rep. (BNA) 389, 390 (Nov. 12, 1986).

179. *See Fourth Swiss Chemical Accident*, *supra* note 169; Tagliabue, *supra* note 170; *'Radical Measures' supra* note 172, at 430-431.

180. *See generally, 'Radical Measures'*, *supra* note 172, at 431-433, 436.

181. *See generally, id.* at 440; *Government Bills Switzerland*, 10 Int'l Env't Rep. (BNA) 3 (Jan. 14, 1987).

182. *See supra* note 172, at 432.

183. *See Government Bills Switzerland*, *supra* note 181.

184. *See id.*

185. *See supra* note 172; *Sandoz Working Group Produces Report*, 10 Int'l Env't Rep. (BNA) 4 (Jan. 14, 1987).

186. *Sandoz Fisherman Settle on Rhine*, 10 Int'l Env't Rep. (BNA) 283 (June 10, 1987).

187. *Sandoz and French Gov't Settle*, 10 Int'l Env't Rep. (BNA) 492 (Oct. 14, 1987).

ecological damage from the November 1986 disaster and announced its donation of $7.3 million to the World Wildlife Fund for a three-year project to restore the flora and fauna of the Rhine River.[188]

Among the multilateral responses to the accident, noteworthy attempts include the establishment of a working group among French, Swiss, and German representatives to update the proper functioning of the information exchange systems and emergency contacts.[189] Also, an agreement was reached on December 19, 1986, regarding the necessary measures to prevent industrial accidents and to limit their consequences, at a ministerial conference on Rhine Pollution.[190] Mostafa K. Tolba, executive director of UNEP, made a proposal to negotiate treaties similar to those adopted on international notification and mutual assistance in the event of a nuclear accident, for prevention of transboundary toxic pollution.[191]

Tolba said at a press conference on December 15, 1986, that UNEP's existing International Register of Potentially Toxic Chemicals (IRPTC) could act as a framework for administering the two treaties.[192] He said that, as there are no existing agreements requiring international notification in the case of an accident involving toxic chemicals, a new convention on the subject is desirable.[193] Commenting on the Sandoz incident, Tolba said that the chemical spill at Basel "shows the ecological and economic folly of assuming that, if we ignore safety standards in the chemical industry, somehow the problems will go away."[194] He added that "[t]he accident reveals the full extent of the apathy, confusion, and general unpreparedness of the world's most advanced nations and the deplorable inadequacy of international legislation."[195] A notification requirement would obligate governments to provide instant information on the chemicals involved and their predicted behavior, the location of the plant, and the safety measures undertaken. The second convention would call for prompt assistance among states parties after an accident to minimize damage and harm.

Earlier, on November 20, 1986, Tolba had suggested that "a legal package should be drafted to prevent another Bhopal or another Basel."[196] As part of that package, he outlined the need for "instituting a program for governments, in cooperation with industry, to work with local leaders to identify acutely toxic chemicals, help prepare control measures

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188. *See Sandoz Accident Seen as New Impetus for Regulatory Actions Already in Works*, 10 Int'l Env't Rep. (BNA) 81,82 (Feb. 11, 1987).

189. *See id.* at 82.

190. *See Sandoz Working Group, supra* note 185, at 5.

191. *See id.* at 6-7.

192. *See id.* at 7.

193. *See id.*

194. *Id.*

195. *Id.*

196. *Radical Measures*, 9 Int'l Env't Rep. (BNA) 434 (Dec. 10, 1986).

to limit accidental releases and deal with such accidents."[197]

V. ISSUES RELATING TO THE EXPORT OF HAZARDOUS TECHNOLOGIES

The issues which emerge from the factual analyses of these four disasters tend to cut across the facile developed/developing country distinction. States often play more than one role in these situations by acting both as a home country and as a recipient country. However, while recipient countries in general face many potential problems as a result of their import of hazardous technologies, developing states that import these technologies or substances often face especially difficult problems due to an increased potential for risk, as many lack effective health, safety, and environmental standards and systems.

This differential in levels of risk between a more-developed recipient country, such as Italy, and a less-developed recipient country, such as India, is illustrated by the respective human losses that were suffered in the Seveso and Bhopal disasters. There has been, to date, no loss of life directly attributable to the Seveso accident. The loss of lives from Bhopal has exceeded 2,000 people, with many of the early deaths resulting from blocked air passages which led to injury to respiratory tissue.[198] This is not to suggest that the value of human life in developing countries is less than in developed countries, but rather that, for historical reasons, the potential risks in developing countries have tended to be higher.

A. *International Legal Norms*

International environmental law is still in a nascent stage of development and is not yet adequately equipped to provide the necessary assurances to the recipient countries in the transfer of hazardous technology that their interests will be protected under applicable norms of international law. Conversely, the applicable international legal norms do not define the responsibility of the exporting or home country to any appreciable extent. Although the current prescriptions by international bodies are usually in the form of non-binding guidelines and principles, the importance of such non-binding principles in eventually shaping environmental law should not be underestimated. They allow experimentation and growth, they create community expectations and influence state behavior, and, as happened with the Universal Declaration of Human Rights and Principle 21 of the Stockholm Declaration on the Human Environment,[199] some of these declarations and principles acquire the status of customary international law. For example, in the area of technology transfer, one could argue that the principles of notification, information exchange and consultation, among emerging principles of international environmental

197. *See id.*

198. *See supra* notes 77-78; *Toxic Substances*, 9 Int'l Env't Rep. (BNA) 133 (Apr. 9, 1986).

199. *See* U.N. Doc. A/CONF. 48/14 (1972).

law, should be considered to have acquired the status of customary international law.

The primary international legal principle in this area, drawn from the *Trail Smelter Arbitration*,[200] generally applies to states rather than to private actors. The decision in that case formulated the following rule: that it is unlawful for a state to cause transfrontier pollution which entails serious damage in another state. However, for both Seveso and Bhopal, unlike Chernobyl and the Sandoz fire in Basel, the activity in question did not generate pollution in the home state which then crossed a boundary to affect the people, property, or environment of an adjoining state. Rather, the whole industrial process took place within a single state and the resultant damage also occurred within that state. Furthermore, the activities which took place at both the Union Carbide and Givaudan plants, at least arguably, did not inherently result in pollution. The fact that accidents did occur may have been a consequence of problems with operating procedures and not the activity itself. Therefore, this principle is not directly applicable to either of those two disasters.

As noted above, some commentators have suggested that customary international law does place a duty upon states to cooperate when dealing with questions of transfrontier pollution.[201] Related to this duty of cooperation are the duties to provide information and to consult and negotiate.[202] However, again, these principles have in the past been applied to activities which occur in areas in geographic proximity to international borders and were not generally applied to industrial activity which occurs only within one state when the effects of that activity are likewise limited. The current efforts to formulate "informed consent" guidelines of the EEC and the United States may be extending these principles to situations such as Bhopal and Seveso.

This absence of norms is inextricably intertwined with the absence of appropriate international institutions and fora within which to maintain a claim once damage has been inflicted. This has meant that victims have had to rely upon national law and national court systems: for Seveso, Italian law and courts; for Bhopal, Indian law and courts; for the Sandoz incident, assumedly the various national laws of the victims and the applicable Swiss laws would be invoked; but in the case of Chernobyl, it is not yet clear how and what setting and under the application of what law

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200. Trail Smelter Arbitration (U.S. v. Can.), 3 R. Int'l Arb. Awards 1911 (1938); *see also* Corfu Channel Case (U.K. v. Albania), [1949] I.C.J. Rep. 4.

201. *See, e.g.*, Bothe, *International Problems of Industrial Siting In Border Areas and National Environmental Policies*, in TRANSFRONTIER POLLUTION AND THE ROLE OF THE STATES 79-97 (OECD 1981); Silva, *Pending Problems on International Law of the Environment*, in THE FUTURE OF THE INTERNATIONAL LAW OF THE ENVIRONMENT 217 (R. Dupuy, ed. 1985).

202. *See* Bothe, *supra* note 201; International Law Association, Committee on Legal Aspects of the Conservation of the Environment, Report to the Manila Conference 1978; Handl, *National Uses of Transboundary Air Resources: The International Entitlement Issue Reconsidered* 26 NAT. RES. J. 405, at 412-13 (1986).

would the claims against the Soviet Union be resolved.[203] The Soviet Union has refused to pay any compensation for crop losses in western European countries resulting from radioactive fallout from Chernobyl, although the Soviets claim that cleanup and relocation costs will total at least $2.98 billion.[204]

Additionally, these national courts and legal traditions may or may not be equipped to provide a speedy and just resolution for claims brought by those damaged by the pollution in question. In the case of Seveso, Hoffmann-LaRoche accepted responsibility for the accident early on, with the negotiations and court actions focusing primarily upon issues of the amount of compensation and the individual responsibility of the officials involved. A similar pattern is discernible following the Sandoz incident. For Bhopal, the issue of responsibility remains unresolved, perhaps in part because the level of damage is so much higher, and, in the case of Chernobyl, there is total uncertainty.[205]

B. *International Standards*

1. OECD

a. Post-Seveso

In the absence of directly applicable, international legal norms, the presence or absence of international standards assumes a greater importance. Prior to the Seveso accident, efforts had begun to address what was perceived by members of the Organization for Economic Cooperation and Development (OECD) as a need for coordination of the activities of the members in the toxic substances area. In 1971, the Sector Group on the Unintended Occurrence of Chemicals in the Environment (Chemicals Group) was formed. While the coordination function of the Chemicals Group became more important following the Seveso accident, initially the group formulated four major sets of recommendations for the member governments. The first of these was the limitation on the use of PCBs;[206] the second was the reduction of environmental discharges of mercury;[207] the third was the keeping of statistics on existing chemicals and the assessment of the potential effects of new chemicals prior to manufacture;[208] and the fourth was procedures for anticipating the effects of new chemicals, of new applications of existing chemicals, and of selected ex-

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203. *See, e.g.*, Malone, *The Chernobyl Accident: A Case Study in International Law Regulating State Responsibility for Transboundary Nuclear Pollution*, 12 COLUM. J. ENVTL. L. 203 (1987).

204. *See* Lee, *Chernobyl and the Nuclear Reaction*, Wash. Post Weekly Ed., Nov. 10, 1986, at 6, col. 1.

205. *See id.*; Malone, *supra* note 203.

206. O.E.C.D. Doc. C. (73), Feb. 20, 1973.

207. O.E.C.D. Doc. C. (73) 172, Oct. 2, 1973.

208. O.E.C.D. Doc. C (74) 215, Nov. 21, 1974.

isting chemicals.[209]

The Chemicals Group also devoted part of its budget to coordination of the various laboratory testing approaches employed by the OECD members. Little attention was devoted to information exchange even after the Seveso accident. The group also focused a portion of its efforts on the economic effects of toxic substances legislation. In particular, the group looked at the effects of inconsistent approaches among member countries to chemical assessment and control, although this emphasis did not appear in earnest until nearly two years after the Seveso disaster.[210]

The OECD Council subsequently adopted two further recommendations prior to the events of late 1984 at Bhopal. In February of that year, the Council recommended to member states principles on transfrontier movements of hazardous waste.[211] The recommendation called for the exchange of "adequate and timely information," which should include specifying "the origin, nature, composition, and quantities of waste intended to be exported, the conditions of carriage, the nature of environmental risks involved, the type of disposal and the identity of all entities concerned with the transfrontier movement or the disposal of the waste."[212] Then in April of 1984, the Council adopted a recommendation concerning information exchange related to the export of banned or severely restricted chemicals.[213]

This recommendation provided guidelines to the exporting country regarding the nature and scope of information it should provide the importing country so as "to enable the latter to make timely and informed decisions concerning the chemical." The recommendation specifically called for the OECD Chemicals Group and the Management Committee of the Special Programs on Chemicals, to submit a report to the Council by April 1987 on implementation of the recommendation.[214] It is reported that most countries are beginning to take action regarding information exchange on chemicals.[215]

Both of these latter recommendations sought primarily to restrict or control specific chemicals, products, or waste materials. Neither focused on regulation of the movement of the actual technology from state to state, with the result that, while the individual chemicals such as methyl isocyanate or trichlorophenol gas may have come within the ambit of the recommendations, the installations in Meda and Bhopal themselves did not. Furthermore, the Council recommendations were directed to member

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209. O.E.C.D. Doc. C. (77) 97, July 13, 1977.

210. *See* Schweitzer, *Toxic Chemicals: Steps Toward Their Evaluation and Control*, in ENVIRONMENTAL PROTECTION: THE INTERNATIONAL DIMENSION, 22-44 (D. Kay & H. Jackson, eds., 1983).

211. O.E.C.D. Doc. C. (83) 180 (Final), Feb. 13, 1984.

212. *Id.*, Principle 5.2.

213. O.E.C.D. Doc. C. (84) 37 (Final), May 3, 1984. *See also* 23 I.L.M. 664 (1984).

214. *See Export Proposal*, 9 Int'l Env't Rep. (BNA) 391, 392 (Nov. 12, 1986).

215. *See id.*

countries and would not necessarily have been applicable in a transfer to a non-OECD country.

b. Post-Bhopal

After the Bhopal accident, a stronger emphasis on the control of industrial processes and installations emerged from the OECD. In December of 1985, the OECD's Committee on International Investment and Multinational Enterprises agreed to incorporate environmental concerns into the Guidelines on Multinational Enterprises by means of a "clarification" of a reference to environmental protection already included. The guidelines indicated that multinationals were to "give due consideration to the member countries' aims and priorities with regard to the protection of the environment and consumer interests."[216]

The Environmental Committee of the OECD set forth its environment program for 1987 and beyond in April of 1986. The Committee emphasized the control of chemicals, hazardous wastes, and air pollutants, and economic development and the environment.[217] A project to suggest ways to improve the environmental assessment capabilities of private investors who undertake environmentally sensitive projects in developing countries was resisted by the United States. Also discussed was a proposal to review regulations and practices in member countries with regard to the control of hazardous installations and to investigate possible OECD guidelines for such installations.[218]

c. Post-Chernobyl and Basel

After the 1986 initiatives, the Environment Committee of the OECD concluded at its next meeting that, in light of the incidents at Chernobyl and Basel, a major priority for its work for 1987 would be the prevention of and response to industrial accidents.[219] The conclusion was reached at a meeting of the committee in Paris on December 9-11, 1986.[220] Specifically, the committee elevated its already planned project on hazardous installations to "a high priority for 1987."[221]

The Environment Committee highlighted four themes for the project:
(1)the need to provide "adequate and timely information" to all concerned parties in the case of an accident in which toxic substances are released;
(2)the need for better coordination, both nationally and across the borders, pertaining to the detection, monitoring, and response to toxic

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216. *See id.* Jan. 8, 1986, at 11.

217. *'Rationalized, Streamlined' Program Agreed by OECD Environment Committee,* 9 Int'l Env't Rep. (BNA) 153 (May 14, 1986).

218. *Id.*

219. *Major Incentive,* 10 Int'l Env't Rep. (BNA) 6 (Jan. 14, 1987).

220. *Id.*

221. *Id.*

releases;
(3)the need to provide for compensation to those who suffer damages from accidental release and for cleanup or environmental restoration costs; and,
(4)the need to take preventive steps and, in the event of an accident, the development of emergency preparedness and response plans.[222]

Erik Lykke, head of the OECD Environment Directorate, announced that by 1989 the OECD will develop an "integrated approach for the control of toxic substances in the environment," with the objective of formulating effective "overall" control strategies for toxic substances of all kinds.[223]

In March 1987, senior environmental protection officials from the member nations of OECD agreed "to take a 'leading role' in strengthening international cooperation for the prevention of and response to industrial accidents and to act to broaden national programs and international cooperation in the areas of testing and control of 'existing' chemicals."[224] The agreement was a result of a French initiative.[225]

In the wake of the Chernobyl accident, the Nuclear Energy Agency (NEA), whose program is shaped by the Steering Committee for Nuclear Energy of the OECD, selected the following priority items for its 1987 agenda: strengthening the NEA Incident Reporting System; expanding work on studies on serious accidents; achieving more effective harmonization and implementation of protection measures against radiation exposure in accident situations; and "developing more comprehensive and efficient international prescriptions on issues of nuclear, third-party liability and victims' compensation."[226]

2. EEC

a. Post-Seveso

Little in the way of multinational guidelines or standards was extant in the European Economic Community prior to the Seveso accident. However, following that disaster, the EEC began to develop a joint approach to hazards resulting from major accidents, based upon the member states' assessment that such an approach allowed them to pool their expertise, to minimize industrial safety controls as a source of competitive

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222. *Id.*

223. *Id.*

224. *OECD Nations to Take 'Leading Role' on Accident Prevention, Chemicals Testing*, 10 Int'l Env't Rep. (BNA) 145 (April 8, 1987).

225. *Id.* at 146.

226. *Reactor Safety, Post-Accidnet Protection Said to Dominate 1987 Work Program of NEA*, 10 Int'l Env't Rep. (BNA) 410 (Nov. 11, 1986). For a report on the safety of nuclear reactors in EOCD countries, see Nuclear Energy Agency, OECD, *Chernobyl and the Safety of Nuclear Reactors in OECD Countries* (Report by NEA Group of Experts 1987).

advantage or disadvantage, to merge accident and hazard control with their toxic chemicals control policy, to reduce the negative impact upon all industry that is caused by such accidents, and to address the special circumstances that are produced by plants located near international boundaries.[227]

As a culmination of these EEC efforts, the Council Directive on Major Accident Hazards of Certain Industrial Activities (so-called Seveso Directive) was formulated in mid-1982 by the Council of the European Communities.[228] The goals of this directive were (1) to prevent major accidents caused by industrial activities and (2) to limit the effects of such accidents if they did occur.[229] The Seveso Directive provided for a system of alarm and notification procedures when incidents involving dangerous chemicals occurred and, as it closely mirrored the events which occurred at the Icmesa plant, the directive therefore addressed process installations and included storage and transportation of chemicals within its definition of industrial activity.[230] The regulatory framework created under the Directive takes into account the nature and quantity of dangerous substances handled at a given plant and the type of activity conducted there.[231] One of the limitations of this directive, as with many such Council Directives, is that the implementation of the mandatory provisions was by and large left to the discretion of each member state. As a result, several of the members of the EEC have been quite slow in carrying out the mandated actions.[232] As of June 1987, only six of the twelve community members had fully implemented the Seveso directive.[233]

b. Post-Bhopal

About one year after the Bhopal accident, the EEC proposed that the Seveso Directive be strengthened by means of a lowering of the thresholds for the substances listed in Annexes III and IV of the directive.[234] These thresholds established the quantity of each substance, above which a company must notify the host country of the presence of the substance. Then, in early 1986, the EEC also opened up informal talks with industry representatives regarding a voluntary code of conduct on the transfer of

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227. *See* von Moltke, *Bhopal and Seveso — Avoiding a Recurrence*, THE ENVIRONMENTAL FORUM 21-23 (June 1985).

228. Directive 82/501/EEC, 5 O.J. No. L 230, 1 (1982), as amended by Directive 87/216/EEC, March 19, 1987.

229. *Id.* art. 1. *See also* art. 3.

230. *Id.* art. 1.

231. *See id.* art. 3.

232. For a recent report on the lack of implementation by member states, see *Most Members Have Not Reported Activities Under Seveso Directive, Commission Reveals*, 10 Int'l Env't Rep. (BNA) 17 (Jan. 14, 1987).

233. *Six Members Have Fully Implemented Sevesco Directive, EC Officials State*, 10 Int'l Env't Rep. (BNA) 327 (July 8, 1987).

234. Proposal for a Council Directive Amending Directive 81/501/EEC on the Major Accident Hazards of Certain Industrial Activities, Com (85) 572 (Final), Nov. 4, 1985.

potentially dangerous technology to developing countries.[235]

c. Post-Chernobyl and Basel

In the wake of the Chernobyl accident, the EEC Commission was concerned with setting uniform standards on levels of radioactivity in foodstuffs as well as on radiation exposure for nuclear industry workers and the general public, and the creation of an "ultra-rapid" information-exchange system for use in the event of nuclear accidents.[236] In August 1986, the Commission proposed a "Council Decision on a Community System of Rapid Exchange of Information in Cases of Unusually High Levels of Radioactivity or of a Nuclear Accident."[237] Under the proposal, a member state would be obligated to notify the Commission whenever it:

> measure[d] unusually high levels of radioactivity from the point of view of health protection or protection of the environment or whenever a nuclear accident or another event occur[red] on the territory of a Member State and there [was] the potential for, or actual occurrence of, an abnormal [sic] high release of radioactivity [sic] materials.[238]

Subsequently, it was announced in May 1987 that the Commission had drawn up an elaborate information exchange scheme which would enable the Community member nations and the Commission to react quickly and effectively to minimize the risks of a nuclear accident.[239] The Commission also developed plans to establish an inspectorate to monitor safety standards at nuclear power stations throughout the EEC.[240]

Following the Sandoz incident, the EEC Environmental Affairs Commissioner, Stanley Clinton Davis, told the European Parliament on November 13, 1986, that if Switzerland, which is not a member of the European Committee, had adopted a Seveso-type legislation, the ecological damage and the resulting pollution of the Rhine in the aftermath of the Sandoz fire "would have been substantially reduced."[241] He said that, in light of the Rhine incident, the EEC Commission will convene a meeting of experts to review the Seveso directive and suggest possible improvements.[242] Davis also noted that, as of December 1986, only four member

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235. *EEC, Industry Discusses Code of Conduct for Transfer of Technology to Third World*, 9 Int'l Env't Rep. (BNA) 33-34 (1986).

236. *Limits on Radioactivity in Foodstuffs to be Proposed Clinton Davis Announces*, 9 Int'l Env't Rep. (BNA) 272 (August 13, 1986).

237. *See* COM (86) 434 (Final), Aug. 20, 1986.

238. *Id.* art. 1.

239. *EC Proposed Information Exchange Strategy Aimed at Quick Response to Nuclear Accidents*, 10 Int'l Env't Rep. (BNA) 271-72 (June 10, 1987).

240. *Nuclear Power Prospects for Long Term Down 40 to 50%; Agency Reports*, 9 Int'l Env't Rep. (BNA) 350-351 (Oct. 8, 1986).

241. *Commission Steps Up Law Enforcement Following Rhine Pollution Occurance*, 9 Int'l Env't Rep. (BNA) 436 (Dec. 10, 1986).

242. *Id.*

states — Denmark, France, the United Kingdom, and West Germany — had implemented the Seveso directive and the new Community members, Portugal and Spain, were given a time extension.[243] According to Davis, the other community states which had not incorporated the 1982 Seveso directive into their national laws faced an initial warning which would be followed by legal action against them in the European Court of Justice at Luxembourg.[244] Subsequently, he reported that the Commission had instituted proceedings against Ireland and Luxembourg for failure to implement the Seveso Directive, and against Belgium, The Netherlands, Italy, and Greece for incomplete information.[245]

Compliance of the European community members with another of their obligations under the Seveso Directive, the provision of information on their national inventory of industrial activities,[246] has also been inadequate. It was reported following the Sandoz incident that the required information regarding the names and locations of plants, the types of industrial activities carried out, and the names of dangerous substances involved, had been provided by only five member countries — Ireland, Italy, Denmark, The Netherlands, and the United Kingdom.[247]

The Sandoz incident also prompted the EEC Environment ministers to ask the EEC Commission to explore the possibility of negotiating bilateral or multilateral treaties with non-EEC members to extend coverage of the Seveso Directive beyond the European Community borders.[248] They outlined three key elements which should underlie multilateral negotiations aimed at achieving "better environmental protection of the Rhine and other major waterways affecting the community: the improvement of the alarm and information system in case of accidental discharges of toxic chemicals; closer harmonization of national legislation on handling of such chemicals"; and "prompt cleanup, restoration, and equitable compensation and liability arrangements" for pollution damage by those responsible for originating it.[249]

Earlier, on July 2, 1986, the EEC Commission submitted to the Council a proposed "Regulation Concerning Export From and the Import Into the Community of Certain Dangerous Chemicals."[250] With the objective of establishing common notification and information procedures for imports and exports of banned or severely restricted chemicals,[251] the proposed Council regulation would require an exporter of such chemicals,

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243. *See id.* at 435.

244. *See id.* at 436.

245. *Most Members Have Not Reported, supra* note 232.

246. The obligation of the states is contained in article 5 of the Seveso Directive, *supra* note 228.

247. *Most Members Have Not Reported, supra* note 232.

248. *Extension of Seveso Oil Spill Legislation to Non-EEC Countries Discussed by Ministers*, 9 Int'l Env't Rep. (BNA) 443 (Dec. 10, 1986).

249. *See id.*

250. COM (86) 362 Final, July 2, 1986.

251. *Id.*, art. 1.

a list of which is contained in an annex,[252] to notify the designated authority of the exporting EEC member.[253] For the initial export of any of such materials, the exporting country would then inform the Commission, which would in turn notify the country of destination.[254] The Commission would then inform the exporting country "of any relevant reaction from the country of destination."[255] Beginning in 1989, the importing country would have to give consent to any shipment of such chemicals.[256] Earlier council directives on packaging and labeling would also apply to the shipment of such chemicals.[257] As was perhaps to be expected, chemical industry officials reacted negatively to this proposal, warning that the proposed regulation could adversely affect the European industry's competitive position.[258]

3. United Nations Guidelines and Standards

Prior to Seveso, the primary U.N. vehicle for activity in the area of the environmental consequences of economic development and the transfer of hazardous technology was the United Nations Environment Program (UNEP), established as a result of the Stockholm Conference in 1972.[259] By the mid-1970s, UNEP had become involved in the area of the export of dangerous pesticides.[260] UNEP's role here was primarily an informational one with no power to regulate. As a result, UNEP gave advisory opinions and generally reacted to problems that arose rather than attempting to anticipate them. Subsequently, it has been involved in a program on provisional notification of banned and severely restricted chemicals.[261]

One aspect of UNEP's work, the International Registry of Potentially Toxic Chemicals (IRPTC), which was designed to compile a list of all such chemicals, is now complete, and now, the next phase is to start a program of monitoring banned chemicals around the world and their effects on human health.[262] The IRPTC is presently engaged in the monitoring of UNEP's program on provisional notification of banned and severely restricted chemicals, and its work in risk assessment operations in the use of chemicals.[263]

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252. *Id.* Annex I.
253. *Id.* art. 3 (2).
254. *Id.* art. 3 (3).
255. *Id.*
256. *Id.* art. 4.
257. *Id.* art. 6.
258. *CEFIC Official Says Export Proposal could Hurt Industry's Competitiveness*, 9 Int'l Env't Rep. (BNA) 390-91 (1986).
259. G.A. Res. 2997, 27 U.N. GAOR Supp. (No. 30) 43, U.N. Doc. A/8730 (1972).
260. U.N. Doc. UNEP/GC/31 (1975).
261. *UNEP Group Moves From List Compilation To Monitoring Banned Chemicals Worldwide*, 9 Int'l Env't Rep. (BNA) 357-58 (Oct. 8, 1986).
262. *Id.* at 357.
263. *Id.* at 358.

Following Seveso, the U.N. General Assembly adopted a resolution on "Protection against products harmful to health and the environment" in December of 1982.[264] The resolution stated that banned products should be sold abroad only on the receiving country's request or if the consumption of such products is officially permitted in the importing country. "Full information" on the severely restricted products was also called for by the resolution.

The World Health Organization, which had been involved with international pesticide regulation since the late 1960s,[265] issued a report through its Committee on Environmental Pollution Control in Relation to Development in mid-1985.[266] The report concluded that environmental considerations should be included in all phases of the planning and decision-making process which lead to formulation of development plans. The report further indicated that the assessment of the health effects of major developmental programs, particularly risk assessment, by developing countries was at present far from satisfactory.

The International Labor Organization (ILO) participated in setting up a task force in late 1985 with a focus on preventing major industrial accidents, such as the Bhopal disaster. The task force was to assist in major hazard audits and to advise governments on setting priorities, upgrading factory inspectorates, and planning training programs.[267] The ILO was also to establish checklists for monitoring standards on major hazard installations, to prepare a comprehensive manual on major hazard control, and to begin work on a code of practice on prevention of major accidents involving hazardous materials or processes.[268]

In early 1986, UNEP gave its backing to the establishment of an international environment bureau to direct industries' involvement in environmental issues.[269] The proposed bureau would be run through the International Chamber of Commerce, although it would be autonomously funded and staffed. The primary functions of the bureau would be to serve as an information coordinating entity and to produce case studies on companies' experiences in environmental management. The continued emphasis on information generation and coordination rather than regulation that characterizes other U.N. efforts in this area was thus maintained.

In addition, the U.N. Center on Transnational Corporations

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264. Resolution 37/137, adopted Dec. 17, 1982.

265. *See, e.g.*, World Health Organization/Food and Agricultural Organization, Guidelines for Legislation Concerning the Registration for Sale and Marketing of Pesticides, WHO Doc. OH/69.3, FAO Doc. PL:CP/21 (1969).

266. *Development Plans in Third World Countries Should Assess Environment, WHO Report Says*, 8 Int'l Env't Rep. (BNA) 237 (July 10, 1985).

267. *ILO Asked to Set Up Task Force*, 8 Int'l Env't Rep. (BNA) 367 (Nov. 13, 1985).

268. *Id.*

269. *New International Bureau to Address Industry's Role*, 9 Int'l Env't Rep. (BNA) 49 (Feb. 12, 1986).

(UNCTC) issued a report which evaluated transnational corporations and issues related to the environment.[270] This report found it likely that governments in developing countries, in the wake of the Bhopal disaster, would impose new requirements for disclosure of information that would allow them to make more effective risk assessments of new plants and equipment. The UNCTC reported that safety considerations had not been given priority attention during the approval process for foreign direct investment or technology acquisition by developing countries. Partly as a result of the India/Union Carbide litigation, the report also suggested that international aspects of insurance issues relating to environmental management were straining the ability of existing civil procedures for the settlement of such cases.[271]

4. Multilateral Development Banks

Prior to Bhopal, the multilateral development banks, and particularly the World Bank, exhibited little direct concern over the potential environmental effects of the projects which were built as a result of bank funding. The World Bank did develop a handbook which set forth the procedures to be followed in evaluating a particular project proposal and the expected environmental consequences. That 1971 handbook attempted to provide guidance on the identification, detection, measurement, and control of adverse environmental effects for any given project.[272] In 1985, the World Bank updated that handbook to bring it more in line with an emphasis on sustained economic development that implicitly depends upon environmental concern.[273] The updated version of the handbook placed environmental analysis of a project as a separate factor to be looked at by the World Bank in evaluating a project.[274]

Early in 1985, the World Bank issued its own guidelines on the use of pesticides in developing countries. These guidelines emphasized that the choice of pesticides for use by developing countries should be based on strict environmental and health criteria.[275]

Later that year, draft guidelines for controlling major industrial accident hazards in developing countries were also issued by the World Bank.[276] The hazards guidelines, which were for use on projects involving pesticides, fertilizers, petrochemicals, and methanol, were drawn from the

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270. *Third World May Require More Information to Improve Risk Assessment*, 9 Int'l Env't Rep. (BNA) 34 (Feb. 12, 1986).

271. *Id.* at 35.

272. *See* Lee, *The Environment, Public Health, and Human Ecology*, (World Bank 1985). For an extensive background discussion of this topic, see Rich, *The Multilateral Development Banks, Environmental Policy, and The United States*, 12 ECOLOGY L.Q. 681 (1985).

273. *See* Lee, *supra* note 272.

274. *Id.*

275. *World Bank's Guidelines*, 8 Int'l Env't Rep. (BNA) 124 (Apr. 10, 1985).

276. *Guides on Accident Hazards*, 8 Int'l Env't Rep. (BNA) 112 (Apr. 10, 1985).

EEC's Seveso Directive and therefore included industrial processes and the storage and transport of hazardous materials.[277] Under the guidelines, hazardous operations were classified on the basis of the quantity of the substance stored or processed at the site or transported. Project developers were required to show that they had recognized any major risks, had taken measures to prevent accidents and minimize the effects of those that do occur, and prepare emergency plans for dealing with such accidents that were compatible with off-site measures drawn up by local authorities.[278]

Legislation passed by the U.S. Congress in late 1985 increased pressure on the multilateral banks in this area by calling upon the directors of the banks to ensure that there was a thorough evaluation of the potential environmental problems associated with all proposed loans for projects involving large impoundments of rivers in tropical countries, penetration roads into undeveloped areas, and agricultural and rural development programs.[279] This legislation provided the groundwork for efforts by the U.S. and Scandinavian directors of the World Bank to hold up a loan for massive regional development scheme in Brazil until the environmental consequences of the project were more thoroughly evaluated.[280]

In the 1986 appropriations measure, the United States Congress reaffirmed a direct linkage of environmental issues and development funding.[281] This resulted in strengthening the pertinent provisions of the 1985 bill, such as requiring instructions to the executive directors of the multilateral development banks to promote the commitment of their institutions to add ecologically trained and experienced people to their staff and to promote consultations in the countries receiving bank loans with nongovernmental organizations that may be adversely affected by the projects.[282] In addition, among new provisions in 1986, one directs the U.S. Agency for International Development to compile categorized lists of proposed projects which are likely to have adverse effects on the environment, natural resources, or indigenous peoples, and the U.S. executive directors are to be instructed to seek changes necessary to eliminate or mitigate these effects.[283] Another mandates that policies similar to those now governing pesticide use be formulated for application to other industrial

277. *Id.*

278. *Id.* at 113.

279. *US Representatives*, 9 Int'l Env't Rep. (BNA) 50 (Feb. 12, 1986); *MDB Development Policies*, 9 Int'l Env't Rep. (BNA) 150 (May 14, 1986). *See also* Rich, *Environmental Management and Multilateral Development Banks*, 10 CULT. SURVIVAL Q. 4 (1986).

280. Environmental Defense Fund Newsletter, December 1986, at 2.

281. For a succinct analysis, see Walsh, *World Bank Pressed on Environmental Reforms*, 234 SCIENCE 813 (Nov. 14, 1986).

282. *Id.* at 814. *See also House Panel Reports Foreign Aid Bill*, 9 Int'l Env't Rep. (BNA) 277, 278 (Aug. 13, 1986); *A Greener Hue for Development Aid*, THE ECONOMIST, March 28, 1987, at 69, col. 1.

283. *House Panel Reports*, *supra* note 282.

chemicals as well.[284]

Some positive developments have occurred since the new president of the World Bank, Barber B. Conable, acknowledged the thrust of these legislative efforts at the annual meeting of the Bank in the fall of 1986, noting that attention to environment was essential for sustained development.[285]

C. *National Standards and Regulations*

1. General

The picture which emerges from an analysis of national perspectives on transfer of hazardous technologies is somewhat blurred by the fact that a single country can be, and often is, both a recipient country and an exporting country. For example, the Bhopal plant had a sister plant in the United States which was based upon the same design plans. The Basel accident illustrated the fact that Switzerland, which was the home country for the parent company of Givaudan, ten years later became the site of its own industrial disaster. Therefore, contradictory perspectives on the issues in this area can often be found within a single country.

2. Industrialized Countries

The members of the EEC have been slow on the uptake with regard to the implementation of the Seveso Directive. It took almost six years from the time of the accident for that directive to even take effect, and, by mid-1984, Italy, Greece, and Belgium still had all failed to take the necessary steps to bring themselves into compliance.[286] Italy, in particular, had been dragging its feet, as the European Commission threatened to take Italy to the European Court of Justice over Italy's failure by 1981 to implement five directives dealing with PCBs, waste oil, and water-related matters.[287] This reluctance to take the necessary measures can be attributed to the manner in which the directive was formulated, as it left the implementation to the discretion of the member states. With regulatory responsibility usually compartmentalized among worker safety and environmental agencies and concerns over the likelihood that disparate regulation by individual member states would create unequal competitive conditions, there was little impetus for countries, such as Italy, to develop the required legislation if that legislation offered no direct economic benefits to the country. In fact, the perception often was that the implement-

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284. Walsh, *supra* note 281 at 814.

285. *Id.* at 815. On the current situation, see Nanda, *Human Rights and Environmental Considerations in the Leading Policies of International Development Agencies — An Introduction*, 17 DEN. J. INT'L L. & POL'Y 26-51 (1988).

286. *Compliance by Belgium, Greece, Italy*, 7 Int'l Env't Rep. (BNA) 220 (July 11, 1984).

287. *Court Actions Brought against Italy*, 4 Int'l Env't Rep. (BNA) 786 (Nov. 4, 1981).

ing legislation would create negative economic effects by increasing manufacturing costs to the companies that would be impacted by the new law and regulations and, therefore, was to be avoided for as long as possible.

However, within a few months of the Bhopal disaster, a new attitude towards hazardous installations was perceptible within the Common Market Countries. Legislation in France was drafted which would permit no construction, residential or commercial, within a required safety zone around such hazardous plants.[288] This legislation would apply to installations already subject to the Seveso Directive. Belgium and Italy followed suit shortly thereafter by introducing the necessary legislation to bring themselves into compliance with the directive.[289] The United Kingdom also drafted new guidelines which addressed issues of emergency planning for industrial sites. This planning was to be completed in consultation with local authorities and public emergency services.[290]

Following the Chernobyl accident, several members of the European community, including Denmark, Greece, Ireland, Portugal, Luxembourg, and West Germany, expressed concern about the safety and security at the controversial French nuclear power plant at Cattenom, near the Luxembourg and West German borders.[291] After a clearance from the EEC Commission, however, the French government started up its first reactor at the plant on October 14, 1986.[292] Subsequent attempts to halt Cattenom by the use of judicial proceedings were unsuccessful.[293]

National legislation in the aftermath of the Chernobyl accident included the 1987 French Decree on the High Council for Nuclear Safety and Information,[294] under which the Council is charged with informing the public and the media on questions of nuclear safety and on incidents and accidents occurring in nuclear installations. The Federal Republic of Germany enacted the Preventive Radiation Protection Act in December 1986,[295] which provides for a clear distribution of administrative powers between the federal government and the states in organizing preventive measures against radioactive contamination caused by nuclear accidents and similar events. Sweden issued two ordinances, in force as of April 1,

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288. *Bill Would Establish Safety Zone*, 8 Int'l Env't Rep. (BNA) 35 (Feb. 13, 1985).

289. *Law to Implement "Seveso Directives"*, 8 Int'l Env't Rep. (BNA) 90 (Feb. 13, 1985); *Minister of Health Issues Order*, Int'l Env't Rep. (BNA) 120 (Apr. 10, 1985).

290. *Executive Issues Emergency Planning Guide*, 8 Int'l Env't Rep. (BNA) 366 (Nov. 13, 1985).

291. *See, e.g., Officials of Germany, Luxembourg Focus on Security*, 9 Int'l Env't Rep. (BNA) 274, 275 (Aug. 13, 1986); *Foreign Ministers Protest Building of Nuclear Plants Near Borders*, 9 Int'l Env't Rep. (BNA) 350 (Oct. 8, 1986).

292. *France Starts up First Cattenom Reactor After Getting Clearance by EEC Commission*, 9 Int'l Env't Rep. (BNA) 409, 410 (Nov. 12, 1986).

293. *Court Declines again to Halt Cattenom*, 10 Int'l Env't Rep. (BNA) 60 (Feb. 11, 1987).

294. *See* 39 NUCLEAR L. BULL. 13 (June 1987).

295. *See id.* at 16.

1987,[296] which provide for compensation to persons who suffered economic losses as a result of the Chernobyl accident. Earlier, in January 1987, the Swedish Parliament amended the 1984 Act on Nuclear Activities, under which there is a prohibition against the granting of a license to construct a nuclear power plant.[297] The amendments entered into force on February 1, 1987.[298]

After the Basel accident, several countries, including West Germany, France, Switzerland, and Canada, adopted stringent safety measures to prevent toxic chemical spills. At a meeting of Environment Ministers from the EEC countries on November 25, 1986, West German Environment Minister, Walter Wallmann, urged the EEC to adopt stringent standards for chemical plants and to conduct a review of industrial liability laws in Europe.[299] Earlier, on November 18, he ordered the regional authorities in West Germany to make a list specifying the location of all pesticide warehouses in the country and called for a strengthening of safety standards.[300] Subsequently, on December 3, he announced that the list of dangerous substances covered by West Germany's environmental regulations would be widened and that requirements for companies reporting pollution incidents to the authorities would be further strengthened.[301]

The French Environment Ministry started taking steps to establish "safety" or "isolation" zones around hazardous installations.[302] On December 17, 1986, it announced several new measures for the effective prevention of accidental pollution in factories.[303] At a ministerial conference on Rhine pollution on December 19, 1986, Swiss President Alfons Egli told a special session of the Swiss Parliament that his government will take "radical measures" to ensure that another disaster like the Sandoz fire does not occur again.[304] On December 18, 1986, cradle-to-grave legislation was introduced in the Canadian House of Commons, the primary focus of which was on preventive aspects.[305]

3. United States

The United States approach, while primarily that of an exporting

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296. *See id.* at 21.

297. *See id.*

298. *See id.* at 20.

299. *Extension of SEVESO, Oil Spill Legislation to Non-EEC Countries Discussed by Ministers*, 9 Int'l Env't Rep. (BNA) 443 (Dec. 10, 1986).

300. *Even Tighter Pollution Regulations Announced in Wake of SANDOZ Incident*, 9 Int'l Env't Rep. (BNA) 438 (Dec. 10, 1986).

301. *Id.*

302. *French Require 'Isolation Zone' Around Factories to Reduce Amount of Risk*, 10 Int'l Env't Rep. (BNA) 16 (Jan. 14, 1987).

303. *Government Bills Switzerland $38 Million*, 10 Int'l Env't Rep. (BNA) 3 (Jan. 14, 1987).

304. *'Radical Measures'*, 9 Int'l Env't Rep. (BNA) 429 (Dec. 10, 1986).

305. *See* 10 Int'l Env. & Rep. (BNA) 9 (Jan. 14, 1987).

country, has also been shaped by the events at the sister plant to Bhopal in Institute, West Virginia. Evaluations and studies, like the one undertaken by the Environmental Protection Agency, looked at possible gaps in the environmental statutes to determine whether statutory changes were needed in order to prevent chemical plant accidents similar to Bhopal from happening.[306] Legislation also was introduced which would have brought increased pressure upon the EPA to strengthen its efforts in chemical safety enforcement.

The United States, as an exporter of technology and products, has in place legislation which provides the basis for the regulation of the export of hazardous technologies or products. In the past, the Export Administration Act (EAA) has been the vehicle for attempts to control sensitive exports.[307] Certainly, the EAA has been used by the U.S. government to prohibit the export of technologies it considered to be sensitive with regard to more traditional foreign policy concerns. In its reenactment in 1985, control of hazardous exports was deemed to be a policy suitable for inclusion with the other traditional concerns.[308] Some have also argued that the National Environmental Policy Act[309] could also be the basis for U.S. regulation of exports. The most directly applicable legislation has been the Federal Insecticide, Fungicide, and Rodenticide Act,[310] which contains both domestic registration and export notification provisions with regard to the export of pesticides.

The policy assumptions which underlie these latter provisions, from the exporting country perspective, are three-fold. First, the notification is a part of the general principle of comity between states, in that it is good practice to alert the recipient country to risks that have been identified by the exporting country with regard to the technology or process in question. Furthermore, notification is assumed to be sufficient to allow the identification of all the risks present and that this identification will result in a valid analysis of those risks, as well as the benefits, by the recipient country.

The Bhopal tragedy, however, brings into sharp focus the questions regarding the propriety of allowing tort litigation in U.S. courts,[311] if a U.S. based multinational enterprise controlled a foreign business and op-

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306. *Task Force Studies Adequacy of U.S. Laws to Prevent Chemical Accidents Like Bhopal*, 8 Int'l Env't Rep. (BNA) 33 (Feb. 13, 1985).

307. 50 U.S.C. App. §§2401-2420.

308. *See* Pub. L. No. 99-64, 99 Stat. 120, 121, § 3(13) (July 12, 1985).

309. 42 U.S.C. §§ 4321-61.

310. 7 U.S.C. § 136. For proposed legislation under which regulations on the export of hazardous substances would have been further strengthened, see H.R. 638, introduced by Congressman Michael Barnes, Jan. 22, 1985, 99th Congress, CONG. REC., at 28, 186; H.R. 1703, introduced by Congressmen Bonker and Solarz, March 25, 1985, 99th Congress, CONG. REC., at 28, 245.

311. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 601 (Tent. Draft No. 4, 1983), lends support to granting access to U.S. courts for Bhopal plaintiffs.

erated it under conditions deficient by standards generally applicable in the United States. This approach would operate on a different set of policy assumptions from those delineated for the existing legislation by projecting the standards prevalent in the United States outside of the U.S. borders. Such a projection of standards assumes that there can and should be a single standard of operation, regardless of the context, and that the United States, at least for its own multinationals, is the appropriate source for that standard.

Finally, notwithstanding a problem with defining "control"[312] to determine access to U.S. courts, enough case law exists in the United States to make a determination for jurisdictional purposes in the antitrust and securities fields, i.e., whether a parent-subsidiary relationship warrants the exercise of jurisdiction in the United States. A similar determination could be made were such legislation adopted pertaining to jurisdiction for tort legislation.

4. Developing Countries

Following the Chernobyl accident, the People's Republic of China promulgated in October 1986 regulations on safety supervision and control of civilian nuclear installations.[313] The regulations set up a regime of licensing and control of such installations and establish a National Nuclear Safety Administration whose task is to centralize supervision of the safety of such installations nationally.

Generally, developing countries tend to be recipient countries for the purpose of the transfer of hazardous technology and products. In the pre-Bhopal context, this meant that the responsibility for the protection of the peoples and the environments in developing countries has also rested with the governments of those countries. At the time of the Stockholm conference in 1972, there was widespread concern among developing countries that the perceived imposition by developed countries of environmental regulations and safeguards was a new way of making a claim on the limited productive resources available to developing countries.[314] This new claim was seen as an obstacle to the future rate of development in these countries. There was also a fear that the more stringent environmental regulations being implemented in the developed countries would limit the export potential for raw materials and products produced by the developing countries. Finally, there was also a general concern among developing countries that they would be expected to bear the increased costs associated with the more stringent environmental regulations with-

312. For a discussion of theories of direct liability for Union Carbide, U.S.A., see Westbrook, *Theories of Parent Company Liability and the Prospects for International Settlement*, 20 TEX. INT'L L.J. 32 (1985).

313. *See* 39 NUCLEAR L. BULL. 9 (June 1987).

314. *See, e.g.*, [Founex report] UNCTAD, *Development and Environment, Report and Working Papers of a Panel of Experts* (Founex) (Mouton 1972); Defries, *supra* note 107.

out having the financial capability to take full advantage of the new opportunities that would arise from the development of environmental control processes.

This initial resistance to incorporating environmental concerns into development plans, when combined with the general enthusiasm with which developing countries courted foreign capital and industrial projects, contributed to the Bhopal accident and, to a slightly lesser extent, the Seveso accident. Countries such as India and Italy were eager to increase their level of industrialization. Special favors in the form of tax breaks or concessions on utility costs were often granted to encourage companies to establish plants in the granting country.

Those mechanisms which did exist that would allow the recipient country to exercise some control over the environmental consequences of the proposed installation or project were often ignored or poorly implemented. In India, zoning codes and development plans did exist for many Indian cities. However, enforcement and implementation were often less than adequate. Furthermore, countries that were encouraging new investment often did not have stringent health and environmental regulations. As noted earlier, Italy did not formulate any legislation specifically addressing environmental issues until after the Seveso accident, and, even then, it did so in an indirect manner.

Recipient countries were often likely to lack trained personnel who had the skills to run a major industrial installation safely. Once a plant was built, the surrounding communities were often not instructed as to the proper procedures in the case of an accident, as occurred at Seveso and Bhopal.

The new guidelines and legislation which have been formulated as a result of these tragedies generally do not shift the burden of responsibility away from the recipient countries. Under the notification requirements, the country receiving the technology or product is still to carry out the analysis of the information received in order to make a determination of possible environmental effects. Where a recipient country lacks the skilled personnel or the funding to adequately analyze such data, the end result may be no different than if no notification had occurred at all.

D. *Nongovernmental Organizations*

Efforts by nongovernmental organizations to shape and generate public support for guidelines or standards in the area of the transfer of hazardous technology have primarily taken place since the Bhopal accident. In early 1985, the Conservation Foundation announced an agreement on voluntary guidelines for labeling pesticides exported to developing countries.[315] In Europe, a coalition seeking controls on exports of

315. *Guides on Labeling Exported Pesticides*, 8 Int'l Env't Rep. (BNA) 124 (Oct. 9, 1985).

dangerous products to developing countries was formed by consumer and environmental groups.[316] The World Resources Institute has also added its voice to the calls for an increased awareness of the relationship between development, population, and environmental problems.[317] Following the Chernobyl and Basel accidents, several nongovernmental groups in Europe sought concerted international action to cope with the threats to the environment caused by such accidents.[318]

E. *Multinational Corporations*

The attitudes toward corporate responsibility for the transfer of hazardous technologies have shifted considerably as a result of the Seveso, Bhopal, and Basel disasters. While, in the case of Union Carbide, there has been no complete acceptance of legal responsibility to date, the settlement negotiations have certainly implied that acceptance by the company.[319] In the cases of Seveso and Basel, that acceptance of liability took place early on.

The major shift has been in the increasingly sharp focus upon the design and operating procedures for major industrial installations. Several reports analyzing the Bhopal accident indicated that the disaster was caused by insufficient attention to safety in the process design, dangerous operating procedures, lack of proper maintenance, faulty equipment, and major costs in manning levels, crew sizes, and skilled supervision.[320] This sharpening of focus has highlighted the general absence of corporate policies on environment and resource management. Such policies would address issues of workplace hazards, industrial accidents, marketing of hazardous products and relations with the recipient country's environment and natural resource officials.[321]

To illustrate, the Sandoz group established an internal working group which redefined safety rules regarding the storage of toxic and flammable substances.[322] The group's specific recommendations related to specifications and equipment of storage buildings, storage density, volume and technique, packaging and storage records; and retention of water used for fire-fighting in case of fire.[323] The European Council of Chemical Manu-

316. *Coalition Seeks 'Meaningful Controls'*, 8 Int'l Env't Rep. (BNA) 339 (Oct. 9, 1985).

317. *New Political Agenda on Environment*, 9 Int'l Env't Rep. (BNA) 12 (Jan. 8, 1986).

318. *Counter Conference Planned*, 9 Int'l Env't Rep. (BNA) 288 (Aug. 13, 1986).

319. *See, e.g., Unions Say Heeding Employee's Warnings Could Have Prevented Accident at Bhopal*, 8 Int'l Env't Rep. (BNA) 308 (1985).

320. *See, e.g.*, the statement by the vice-president of Dow Chemical Canada Inc., that better management practices were the key to preventing tragedies such as Bhopal. Quoted in *Better Management Policies*, 8 Int'l Env't Rep. (BNA) 232 (July 10, 1985).

321. *SANDOZ Working Group Produces Report*, 10 Int'l Env't Rep. (BNA) 4 (Jan. 14, 1987).

322. *Id.*

323. *European Chemical Manufacturers Agree on Guidelines*, 10 Int'l Env't Rep. (BNA) 329 (Nov. 11, 1987).

facturers Federation prepared guidelines in May 1987 which are based on the premise that the chemicals industry "has a duty to satisfy itself that its products are manufactured, handled, transported, used, and disposed of safely and without unacceptable risk to the environment and that it should not only comply with the law, but also take independent and responsible actions."

Increased emphasis on changes in corporate policies, however, has not been without resistance, as the Business and Industry Advisory Committee objected to guidelines proposed by the OECD's Environment Committee which called upon multinational corporations to consider environmental protection and environmentally related health problems and to cooperate with local authorities by providing information and assistance.[324] Similarly, resistance by the chemical industry to the proposed more stringent regulations by the EEC in 1986 regarding the export of banned or severely restricted chemicals was quite vocal.[325]

VI. APPRAISAL AND RECOMMENDATIONS

A. *General*

The preceding survey highlights the need for further action on all levels — multilateral, bilateral, and national. It is only in the aftermath of these tragic occurrences that safety issues pertaining to the export of hazardous substances and technology and nuclear power plants have received special attention both nationally and internationally. How to translate the enhanced worldwide concern with and awareness of these issues[326] into concrete measures is the next challenge. Specifically, the need is to develop further the existing principles of international environmental law and to clarify the roles and obligations of international organizations, exporting countries, recipient countries, and multinational enterprises.

B. *International Legal Norms and International Standards*

It is high time that selected developing norms of international environmental law, such as the principles of timely notification, information

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324. *Guidelines for Multinationals, Environment Rejected*, 8 Int'l Env't Rep. (BNA) 186 (June 12, 1985).

325. *See CEFIC Official says Export Proposal Could Hurt Industry's Competitiveness*, 9 Int'l Env't Rep. (BNA) 391-92 (Nov. 12, 1986); *see also Making Company Disasters Less Disastrous*, THE ECONOMIST, Jan. 31, 1987, at 55, col. 1.

326. According to a recent EEC poll, released on December 4, 1986, 59 percent of the respondents named chemical plants as the pollution source worrying them most. Commenting on the poll, the EEC Environmental Affairs Commissioner said at a news conference that "[p]ublic awareness of and concern about environmental issues continues to grow. This poll confirms public uneasiness about environmental issues and the failure of public authorities to deal effectively with the threats to our environment." *Chemical Pollution Top Public Concern*, 9 Int'l Env't Rep. (BNA) 441 (Dec. 12, 1986).

exchange, and consultation, on which a broad consensus already exists, be enshrined in a general convention on environmental protection. The Convention on Early Notification of a Nuclear Accident,[327] which entered into force on October 27, 1986, represents a step in this direction, with its requirement that states promptly publicize any information concerning nuclear accidents in order to minimize the transboundary impacts of such an accident.[328] Similarly, the need is to develop and clarify the obligation of a state causing transboundary harm to grant affected persons equal access and equal treatment to administrative and judicial proceedings.[329] Also, mediation, conciliation, and arbitration as dispute settlement mechanisms need to be refined and encouraged.[330]

A promising development in this area is the work of the World Commission on Environment and Development, which in August 1986 received a report from an expert's group on legal principles on environmental protection and sustainable development which should be in place by the year 2000.[331] Beginning with article 1 which recognizes the "fundamental right to all human beings to an environment adequate for their health and well-being,"[332] the group recommended a set of 22 articles to constitute a framework for global cooperation on both preventive and remedial aspects.[333]

The recent activities of the UNEP,[334] the EEC,[335] the OECD,[336] and other regional groups[337] as well as states[338] and multinational enterprises[339] are indeed responsive to the growing need, especially of the recipient countries. Even further emphasis on anticipatory and preventive aspects is needed.

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327. *Reprinted in* 25 I.L.M. 1370 (1986).

328. *Id.* art. 2.

329. For an OECD recommendation on the subject, see *Recommendation of the Council for Implementation of Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution*, OECD Doc. C.(77) 28 (Final 1977).

330. For reports on recent programs in this area, see generally Anderson, *Negotiation and Informal Agency Action*, 1985 DUKE L.J. 261; Patton, *Settling Environmental Disputes: The Experience with and Future of Environmental Mediation*, 14 ENVTL. L. 547 (1984); and Wald, *Negotiation of Environmental Disputes: A New Role for the Courts*, 10 COLUM. J. ENVTL. L. 1 (1985).

331. *See* Experts Group on Environmental Law of the World Commission on Environment and Development, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (R.D. Munro and J.G. Lammers, eds. 1987).

332. *OCED Gets Report From Experts Group on International Law*, 9 Int'l Env't Rep. (BNA) 417 (Nov. 11, 1986).

333. *See id.* at 417-18; *see also* Shabecoff, *Pollution Study: The Economic Link*, N.Y. Times, April, 27, 1987, at 1, col.1.

334. *See supra* § V(B)(3).

335. *See supra* § V(B)(2).

336. *Id.* § V(B)(1).

337. Regional groups such as the Organization of American States have only recently begun to take initiatives in this area.

338. *See supra* at § V(C).

339. *See supra* § V(E).

While the notion of state responsibility concerning issues such as transboundary pollution is receiving considerable attention,[340] it is also appropriate to consider the issue of state responsibility with regard to transfers of dangerous technology and hazardous wastes. An examination of the examples discussed earlier in this article will reveal the difficulty in applying the concept to this area: most of the transfers were between private parties rather than states, with the role of the state being merely regulatory.[341]

Traditionally, state responsibility has been used as a means for imposing reparations upon a state that has caused damage to parties abroad.[342] However, in the case of the type of accidents considered here, monetary damages are poor compensation for possibly permanent damage to the environment. Thus, imposition of state responsibility may also be said to have a second purpose, which would be to encourage nations to enact and enforce environmental standards that would prevent such accidents from occurring.[343] Therefore, even though a state may not be a party to a transaction that brings a dangerous technology within its borders, it can be said to have an obligation to regulate that technology so that it does not cause harm.[344]

This also raises the question whether a nation which exports such technology may also bear responsibility, even though it is not a party to the transaction. A state that allows careless export of a hazardous technology would probably have to share responsibility with a state that allows careless imports of technology. However, it is not always the mere export of the technology that is the cause of such accidents: there may be such issues as careless supervision and failure to enforce local laws or company regulations.[345] It would also seem that the preventative purpose of the doctrine of state responsibility would not be well served by in ef-

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340. *See generally* Magraw, *Transboundary Harm: The International Law Commission's Study of 'International Liability*, 80 AM. J. INT'L L. 305 (1986); Nanda, *The Establishment of International Standards for Transnational Environmental Injury*, 60 IOWA L. REV. 1089 (1979); Williams, *Public International Law Governing Transboundary Pollution*, 13 U. QUEENSLAND L. J. 112 (1984); *International Liability for Nuclear Pollution*, 11 SUFF. TRANSNAT'L L. J. 75 (1987); Goldie, *Transfrontier Pollution — From Concepts of Liability to Administrative Conciliation*, 12 SYR. J. INT'L L. & COM. 185 (1985); *International Pollution: The Struggle Between States and Scholars Over Customary Environmental Norms: The Hazy View After Chernobyl and Basel*, 12 S. ILL. U. L. J. 247 (1987); *see also supra* notes 20-21 (on a proposed convention controlling transboundary shipments of hazardous waste).

341. *But see*, Handl, *State Responsibility for Accidental Transnational Environmental Damage by Private Persons*, 74 AM. J. INT'L L. 525 (1980).

342. *See* Williams, *supra* note 340, at 115; *Report of the International Law Commission on the Work of Its 39th Session*, 42 U.N. GAOR, supp. (No. 10) at 89, U.N. Doc. A/42/10 (1987)[hereinafter cited as *ILC Rep.*].

343. *See* Magraw, *supra* note 340, at 326; *ILC Rep*, *supra* note 343, at 108-110.

344. *See, e.g.*, Report of the U. N. Conference on the Human Environment, *supra* note 24.

345. *See supra* note 82 and accompanying text.

fect relieving the importing nation of the financial responsibility for any future accident by holding the exporting state liable for compensation. However, by relieving the exporting state of all responsibility, there may indeed be serious difficulties for innocent victims seeking compensation for injuries and other losses.

Keeping the above difficulties in mind, it is appropriate to now inquire into alternate theories of liability. While several theories have been suggested by commentators, two will be discussed here.[346] A fault basis of liability would allow liability to be imposed when a state breaches an obligation, causing an injury to a party in another state.[347] Strict liability would impose liability for acts or omissions that cause injuries in another territory even if applicable standards of care were maintained.[348] The rationale of strict liability is to make such injuries part of the cost of the enterprise.[349] In effect, it would be because a state is gaining a benefit from the existence of the enterprise (taxes, employment, experts, etc.) that it should also have to bear the risk of loss vis-a-vis an innocent third party. In a purely domestic situation, it would also be justified on a theory of loss-spreading — a corporation could pass on the added costs (of insurance, judgments) throughout the society by increasing the price of its products. Since society benefits from the products, society as a whole should bear the cost of the risk, rather than the innocent injured individual.[350] Even though the company may be "innocent," i.e., not at fault, since it can better spread the loss, it would be liable. This loss-spreading rationale may not be directly applicable to states in the case of an accident that causes harm in another country, since, theoretically, the loss would not be spread in the country where the loss occurred. However, the theory of enterprise liability would still be applicable, since the society that benefits from the enterprise by profiting from the export would be liable for risks caused by it.

It should be noted that the imposition of state responsibility would not exonerate the private companies that may be responsible for the accident.[351] Injured parties may also choose to seek a judgment against these companies; however, in many cases there may be difficulties, such as access to the courts of a foreign nation, etc.[352] Even if a state is held responsible and pays compensation, it would still be able to demand compensation from the company.[353]

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346. Additional theories would include subjective fault criteria (*see* Williams, *supra* note 340, at 116) and absolute liability (*id.* at 117-18; Goldie, *supra* note 340, at 195-98; Magraw, *supra* note 340, at 327).

347. *See* Magraw, *supra* note 340, at 316-19.

348. *See id.*; *ILC Rep.*, *supra* note 342, at 111-13; Goldie, *supra* note 341, at 190.

349. *See* Goldie, *supra* note 340, at 190.

350. *See id.* at 193.

351. *See ILC Rep.*, *supra* note 342, at 110-11.

352. *See id.* at 111.

353. *See id.*

There is as yet no consensus on whether any of these theories of liability has already been accepted as customary. The recent discussions of the International Law Commission concerning International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law reflect a diversity of views on the subject.[354] Some representatives felt that strict liability was not presently accepted in international law,[355] while others did.[356] The Special Rapporteur defended the inclusion of the concept as it was necessary to provide compensation, and he also asserted that strict liability would not necessarily be inconsistent with the preventive purpose of the topic.[357] He also suggested that, to accomplish these purposes, the concept of strict liability might be modified from the concept used in domestic legal systems and in some international conventions.[358]

If some obligation is to be the underlying basis of state responsibility concerning accidents involving dangerous technology and hazardous wastes, the nature of the obligation must be explored further. Principle 21 of the 1972 Declaration of the U.N. Conference on the Human Environment could be the basis of an obligation to regulate adequately activities within a nation's borders so as not to harm the environment of other nations.[359] In the case of export of hazardous waste, this principle could be clearly construed to impose an obligation on the exporting nation, since the activity that produced the waste took place there. In most cases, if such a nation has no adequate way for disposing of the waste, as a producer of the waste, it should be responsible for the consequences.[360]

However, the export of hazardous technology may not easily fit within this framework. Instead, certain other obligations may be said to fall upon exporting nations. The exporting nation may be responsible for ensuring that appropriate information is disclosed to the importing nation regarding the potential hazards posed by the technology.[361] Further, it may also be required to ensure that adequate designs and safeguards are furnished to the importing nations regarding hazardous installations.[362] The breach of these obligations might give rise to state responsibility of the exporting nation if the damage were caused by such an omission.

Presently, the International Law Commission is engaged in the study

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354. *See id.* at 89-115.

355. *See id.* at 111-112.

356. *See id.* at 112, citing *Trail Smelter* arbitration, (U.S. v. Can.) 3 R. Int'l Arb. Awards 1905 (1938 and 1941); and Gut Dam Claims, *reprinted in* 8 I.L.M. 118 (1980).

357. *See id.* at 113.

358. *See id.*

359. *See* note 24 *supra.*

360. The U.S. has recently considered such an obligation; *see U.S. Would Tie Waste Exports to Bilateral Agreements*, 11 Int'l Env't Rep. (BNA) 472 (Sept. 14,1988).

361. Such as decision was passed recently by the OECD Governing Council, *Hazardous Installation Measures Adopted*, 11 Int'l Env't Rep. (BNA) 465 (Sept. 14, 1988).

362. *See id.*

of a workable regime concerning the topic of state responsibility.[363] While the debate thus far indicates that there are widely divergent views on some issues, the necessity of reaching a consensus in the area seems widely understood. Concepts such as "knowledge" and "foreseeability" may also be important in allaying the fears some nations have of expanded liability.[364] Once concepts become clearer in their application to simpler cases, a better evaluation of state responsibility regarding the export of hazardous technology can then be made. For the time being, awareness of the issues involved, as well as genuine concern for the protection of the environment, are the essential first steps. The next task is to have in place appropriate domestic and regional legislation, as well as responsible and restrained actions on the part of multinational enterprises.

C. The Role of the Main Actors

Problems are likely to be accentuated, especially for developing states,[365] in the absence of a systematic information-sharing system. Generally, as recipient countries of hazardous products or technology, they have to rely on foreign test data, due to the fact that many of them lack the capability and wherewithal to conduct adequate risk analysis and, therefore, are unable to make intelligent choices about appropriate technology and products. Also, many developing states lack adequate environmental laws and regulations[366] and even those in place are inconsistently applied and implemented.[367]

As discussed earlier, it may be necessary for exporting countries to apply their own laws, such as export control mechanisms,[368] to assist in a worldwide effort to prevent harm from hazardous substances and technology. It may be that the application of more stringent standards of exporting countries should apply to such exports even when the recipient state with its lax standards would welcome a hazardous substance or technology. Also, both developed countries and international organizations can play a useful role in providing recipient countries with the technical assistance which they sorely need. It is equally important that multinational enterprises act in a responsible fashion.

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363. *See ILC Rep.*, *supra* note 342. For a report on the earlier work of the International Law Commission regarding environmental law and state responsibility, see generally McCaffrey, *An Update on the Contributions of the International Law Commission to International Environmental Law Relating to the Environment*, 11 ECOLOGY L. Q. 189 (1983).

364. *See ILC Rep.*, *supra* note 342, at 93-94.

365. *See supra* § III(C)(4).

366. *See, e.g.*, Nanda, *The Development of U.S. Environmental Law: Some Lessons for Other Nations* (Paper presented at Conference on Common Law in Asia, University of Hong Kong, Dec. 15-17, 1986, a copy of which is on file with the DEN. J. INT'L L. & POL'Y).

367. *See id.*

368. *See supra* § III(C)(3).

VII. CONCLUSION

It is perhaps useful to recall that the modern environmental movement is of rather recent origin and can be traced to the 1960s when Rachel Carson' *Silent Spring*[369] and Garret Hardin's *The Tragedy of the Commons*[370] enhanced public awareness on environmental issues. Seveso, Bhopal, Chernobyl, and Basel have shocked the world community into paying special attention to issues concerning the export of hazardous substances and technologies. Thus, at a recent world conference on chemical accidents, there

> emerged a sense of the all-too-real potential for industrial accidents; the need for emergency preparedness and response efforts that are realistic and multidisciplinary; the necessity of involving government, industry, and the public in the planning process; the gaps in information on health and safety effects of chemicals; the importance of preventive measures; and the need for international cooperation and coordination in response planning and in notification given other countries.[371]

Similarly, the dumping of hazardous wastes abroad is a matter of international concern. As noted earlier,[372] pertinent forms of international environmental law are still in a developing stage. Although these norms are not at present considered obligatory as "hard" law upon states, international organizations and multinational enterprises, they provide useful guidelines for the activities of these actors. Also, even if these norms are deemed as "soft" law, they nonetheless reflect a growing trend.

Such developing norms relate to state responsibility,[373] and also include the obligation to exchange information and to notify and consult in a timely fashion;[374] the imposition of strict liability for the harm caused by the export of hazardous waste or technology;[375] and the imposition of liability to compensate the victims.[376] To prevent further Bhopals there is urgency for the formulation of enforceable international legal standards which are applicable to the export of hazardous technologies. Similar standards are needed to apply to the export of hazardous waste. As the cases studied here show, the problem is serious. Until recently, however, the gravity of the challenge was not universally recognized. Now that it is acknowledged that these cases may simply be the tip of the iceberg, much more needs to be done in taking both preventive and remedial measures.

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369. R. CARSON, SILENT SPRING (1962).

370. Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

371. *World Conference on Chemical Accidents Reflects Concern over Recent Disasters, Highlights Need for Planning, Cooperation*, 10 Int'l Env't Rep. (BNA) 407 (Aug. 12, 1987).

372. *See supra* §§ III, V(A), VI(B.).

373. *See supra* notes 33-38, 340-364, and accompanying text.

374. *See supra* note 202.

375. *See supra* notes 348-350 and accompanying text.

376. *See* Rosencranz, *Bhopal, Transnational Corporations, and Hazardous Technologies*, 17 AMBIO 336, 336-337 (1988).

The problem needs to be addressed urgently and promptly. Appropriately, the enhanced awareness that only concerted global efforts can succeed is now being translated into specific measures by UNEP, regional organizations such as OECD and EEC, and national legislation. The world community has no choice but to find effective measures at the global, regional, bilateral and national levels to meet this challenge.

The Nationality of Ships and International Responsibility: The Reflagging of The Kuwaiti Oil Tankers

I. INTRODUCTION

"Nationality" is a term which has been used to define the legal relationship between a state and a ship authorized to fly its flag. The concept is a corollary of the principle of freedom of the high seas.[1] It reflects the belief that every ship should be subject to the sovereignty of some state which can ensure that the ship fulfills its international responsibilities.[2] A ship looks first to the law of the state whose nationality it possesses for a definition of its rights and duties. From the legislature of that state may come both the promise of favorable regulation and the demand for new standards in mechanical equipment or lifesaving devices.[3]

Maritime flags are a symbol of nationality. As such, they generally are thought to be important for determining when a relationship exists between a state and a ship and, thus, when a vessel is subject to the law of a state.[4] It is the thesis of this discussion, however, that maritime flags fulfill a second purpose: Maritime flags not only represent a link between a vessel and a state, but also represent a link between a state and the international community. This linkage arises from the mutual responsibilities which are corollary to the right to flag a ship.

States are subject to two categories of responsibility. First, responsibilities arise in the decision of whether to flag a ship. States must grant nationality to a ship under internationally respected criteria. Because international law places few restrictions on the right to grant nationality to ships, this responsibility is easily fulfilled. Second, responsibilities arise in the sailing of a flagged vessel. The flag state has a general obligation to neither impede nor endanger other states' use of international waters. Consideration for the right of all states to sail on the high seas requires that each state undertake efforts to sail safe ships.

The purpose of this discussion is to refocus analysis of the nationality

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1. The S.S Lotus, P.C.I.J., Ser. A, No. 10 at 25 (1927).

2. Several writers have stated that the entire legal system evolved for use of the high seas depends upon each ship possessing the flag of a recognized international personality. *See, e.g.* R. RIENOW, THE TEST OF THE NATIONALITY OF A MERCHANT VESSEL 12-15 (1937); M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 1066 (1962); N. Singh, *International Law Problems of Merchant Shipping*, 107 RECUEIL DE COURS DE L'ACADEMIE DE DROIT INT'L 19 (1962).

3. RIENOW, *supra* note 2, at 7.

4. *See, e.g.* I.M. Sinan, *UNCTAD and Flags of Convenience*, 96 J. WORLD TRADE 95, at 95, 97 (1982).

of ships in order to highlight the important state responsibilities which are incumbent upon all flag-bearing states. A reexamination of the nationality of ships is warranted in light of the United States' decision to reflag Kuwaiti oil tankers in the Persian Gulf, a decision which may lead to other political reflaggings. This discussion will examine the obligations of flag states and determine whether the United States met these obligations in reflagging the tankers. It will examine: (1) whether the United States gave its nationality to the Kuwaiti oil tankers under internationally-accepted criteria and, thus, the tankers had the right under international law to carry the American flag; and (2) whether the United States, in sailing the Kuwaiti tankers, has fulfilled its responsibility to sail safe ships. In order to provide a background for discussion of these issues, the initial discussion will review the circumstances surrounding the reflagging of the Kuwaiti tankers.

II. BACKGROUND: THE REFLAGGING OF KUWAITI OIL TANKERS

In response to the increasing frequency of attack on civilian vessels arising out of the Iran-Iraq war, Kuwait formulated a proposal in early April, 1987, under which the U.S. would attempt to protect Kuwait-owned ships from attack in the Persian Gulf by transferring the registration of tankers to the American flag.[5] The Reagan Administration agreed to the plan. The stated rationale was to preserve freedom of navigation in the Persian Gulf.[6] In their letter to the United States Coast Guard, setting forth the reflagging proposal, Kuwaiti officials offered another rationale. They simply stated that "[t]he reasons for Kuwait wishing to reflag are political. . ."[7]

Representatives of the Coast Guard and representatives of the Kuwait Oil Tanker Company (KOTC) met on April 22 and 23, 1987, to explore the requirements for reflagging.[8] The parties noted that the tankers might fall below internationally acceptable standards in many areas, including: life-saving equipment, automation, steering gear requirements, fire protection, navigation, electrical installation, and ventilation systems.[9] Facing political pressure, the Coast Guard agreed to waive certain

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5. N.Y. Times, April 7, 1987, at A10, col. 3.

6. It has been suggested that there were deeper reasons for the reflagging: "to tilt to Iraq by helping its ally, Kuwait . . . to block Soviet help for Arab moderates . . . and to help the Arab world forget the Iran arms-for-hostages fiasco." N.Y. Times, July 19, 1987, at E24, col. 1. *See also* CONG. REC. H4095, 4104 (daily ed. June 2, 1987) [statement of Rep. Miller of Washington]. President Reagan has admitted that protection of freedom of navigation is not an altruistic goal. Rather, it is most important for Western economies because it will allow Persian Gulf oil to reach Western markets. N.Y. Times, May 30, 1987 at A1, col. 2.

7. Letter to Captain James C. Card, Chief Merchant Vessel Inspection and Documentation Division, U.S. Coast Guard Headquarters, from Tim Stafford, Manager Fleet Development, Kuwait Oil Tanker Company (April 24, 1987).

8. *Id.*

9. Memorandum to members, Committee on Merchant Marine and Fisheries, U.S. House of Representatives, from Walter B. Jones, Chairman, and Robert W. Davis, Ranking

procedures and regulatory requirements for a period of one year from certification.[10] Nevertheless, the Coast Guard refused to grant waivers for life preservers and any "manifestly unsafe conditions found during inspections."[11]

After the April meetings, the reflagging process proceeded rapidly. Deputy Secretary of Defense William H. Taft IV requested national defense waivers[12] from the U.S. Coast Guard Navigation and Inspection Laws and Regulations, the requirements of which exceed those contained in the several applicable international conventions.[13] Under the Code of Federal Regulations, such waivers may be granted if they are "necessary in the interest of national defense."[14] The Deputy Secretary of Defense noted the interests involved:

> President Reagan has stated that the U.S. considers the continued flow of oil through the Strait of Hormuz and freedom of navigation in the Persian Gulf as interests of vital importance. The reflagging is necessary to facilitate U.S. Naval protection of the Kuwaiti tankers in and around the Persian Gulf.[15]

The Coast Guard granted the waiver request on May 29, 1987.[16] At the same time, the Federal Communications Commission issued a one-year exemption from the requirement that the Kuwaiti ships carry the type of radio and telegraph equipment required of U.S. vessels.[17]

Kuwait circumvented the requirement that applications for documentation be made by U.S. citizens by forming Chesapeake Shipping,

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Minority Member (June 5, 1987), [hereinafter House Memorandum].

10. Telex to Mr. Stafford, Kuwait Oil Tanker Company, from U.S. Coast Guard Headquarters (May 4, 1987).

11. *Id.*

12. The authority for the waiver is contained in the Act of December 27, 1950, 46 App. U.S.C. note prec. 1 (1958). The waiver law originally was designed by the Truman Administration to facilitate the movement of military supplies and personnel to the Korean conflict. Many of the 132 waivers granted since 1950, however, were for coastwise movements and were totally unrelated to military conflict. House Memorandum, *supra* note 9, at 6.

13. Memorandum for the Commandant, U.S. Coast Guard, William H. Taft IV, Deputy Secretary of Defense (May 14, 1987).

14. 46 C.F.R. §6.01 (1986) [procedures for effecting individual waivers of navigation and vessel inspection laws and regulations].

15. Memorandum from William H. Taft, *supra* note 13. Whether this actually constitutes a national defense interest is open to debate. For the opinion that the reflagging responds more to politics and perceptions than to an objective military situation see N. Y. Times, July 12, 1987 at E3, col.1.

16. Letter to William H. Taft, IV, Deputy Secretary of Defense, from P.A. Yost, U.S. Coast Guard Commandant,(May 29, 1987). The Coast Guard has no discretion when the Department of Defense requests a waiver. House Memorandum, *supra* note 9, at 6.

17. Telex to Tim Stafford, Chesapeake Shipping Inc., from Robert H. McNamara, Chief, Aviation and Marine Branch, Federal Communications Commission (May 28, 1987). *See also* Exemption Certificate, issued under the International Convention for Safety of Life at Sea by the U.S. Federal Communications Commission, for the *M.T. Townsend* (May 25, 1987).

Inc., a "paper company" incorporated in the U.S.[18] Under a complex commercial transaction, ownership of the tankers was shifted to Chesapeake Shipping, which remained indirectly owned by the Kuwaiti Oil Tanker Company.[19] Applications for inspection were then submitted through Chesapeake Shipping. The Coast Guard began its inspections in May, 1987, but due to the limited availability of each vessel, concentrated only on major safety areas and granted one-year grace periods during which strict compliance with U.S. laws would not be required.[20] The vessels were inspected individually and were re-registered at a slow pace throughout the summer and early fall.[21]

After the inspections had already begun, the Kuwait Oil Tanker Company and The U.S. Coast Guard signed a formal memorandum of agreement.[22] The parties agreed to the one-year safety requirement waivers and to minimal manning requirements—only the master of each vessel was required to be a U.S. citizen.[23] Traditional U.S. manning requirements were avoided due to a loophole in the regulations,[24] which normally require that upon leaving a U.S. port, all officers and 75% of the unlicensed seamen must be U.S. citizens.[25] Since the vessels were not departing a U.S. port, they were not required to employ U.S. mariners until such time as the tankers return to a U.S. port, an unlikely eventuality.[26]

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18. Statement of the Honorable John Gaughan, Maritime Administrator of the Department of Transportation, before the House Merchant Marine and Fisheries Committee (June 18, 1987). The address of Chesapeake is listed care of Prentice Hall Corporate Systems Inc., but Prentice Hall has been unable to supply any details of Chesapeake executives, thus adding weight to the hypothesis that the company is little more than a shell. Seatrade Week, May 15-21, 1987, at 2. In addition, Chesapeake does not manage the Kuwaiti tanker. Instead, recruiting and other personnel matters are conducted by an outside company, Glen Eagle Ship Management of Houston, Texas. Telephone Conversation with John Lovell, President, Glen Eagle Ship Management (January 27, 1988).

19. N.Y. Times, July 22, 1987, at A1, col. 6.

20. Letter to Mr. Tim Stafford, Kuwait Oil Tanker Company, from J.C. Card, Captain, U.S. Coast Guard (May 21, 1987) [hereinafter May 21 Coast Guard Letter].

21. "Inspections, Manning Slow Kuwaiti Ship Reflagging," Journal of Commerce, June 1, 1987. All 11 vessels were inspected by June 15, 1987. "Labor Steps Up Heat on Kuwaiti Tankers," Journal of Commerce, June 15, 1987. The first two tankers were cleared by the U.S. Coast Guard on July 16, 1987. N.Y. Times, July 17, 1987, at B8, col. 6. Three more ships were re-registered in August. N.Y. Times, August 3, 1987, at A1, col. 5; N.Y. Times, August 9, 1987, at A12, col. 3.

22. Memorandum of Agreement Between Kuwait Oil Tanker Company and The United States Coast Guard, signed by J.C. Card, Captain, U.S. Coast Guard (May 21, 1987), and by the Kuwait Oil Tanker Company (June 2, 1987).

23. *Id. See also* May 21 Coast Guard Letter, *supra* note 20, at 2. Under U.S. law, all officers must be U.S. citizens, unless "for any reason deprived of (their) services" in which case foreigners may be employed. This exception applies to all officers except for the master who must be a U.S. citizen at all times. 46 U.S.C. §§ 7102 & 8103(a),(e) (Supp. II, 1984).

24. N.Y. Times, May 23, 1987, at A5, col. 1 (Representative Helen Bentley, Democrat of Maryland, criticizing decision to use loophole in manning requirements).

25. 46 U.S.C. § 8103(b) (Supp. II, 1984).

26. The loophole in the regulations was closed by the passage of H.R. 2598 which was adopted into law on January 11, 1988. Pub. L. No. 100-239. The new law requires that on

After the Iraqi attack on the American frigate *Stark*, which killed 37 sailors, the U.S. Senate voted to block reflagging until the Reagan Administration could produce a report on how the newly-flagged ships would be protected.[27] The Reagan Administration therefore postponed implementation of the reflagging plan until it could determine what forces were necessary to safely escort the vessels.[28] An intricate plan which met the requirements of the Senate was eventually developed,[29] and the first two re-registered Kuwaiti tankers, accompanied by U.S. warships,[30] sailed into the Persian Gulf on July 22, 1987.[31]

III. STATE RESPONSIBILITIES IN THE REFLAGGING DECISION

The scenario outlined above indicates that the decision to reflag the Kuwaiti oil tankers is rather unique in that it was politically motivated, rather than a product of economic factors. In a more common situation such as the latter, an American ship might be reflagged by a state having little or no connection to the ship in order to avoid stringent (and relatively expensive) American labor laws, tax provisions, and safety regulations.[32] In the present case Kuwaiti ships were reflagged by the United States, similarly with little or no connection to the vessels, for political reasons.[33] In both cases, however, the responsibilities of the flag-carrying state to the world community are the same. In order to analyze the significance of the Kuwaiti reflagging under international law, this section first examines the internationally-accepted criteria which must be met for flagging a ship, and then attempts to determine whether the criteria were met in the present case.

American-flagged vessels all licensed seamen, and 75% of all unlicensed seamen must be U.S. citizens regardless of whether the ship calls on American ports. This provision means that the Kuwaiti tankers must now be reviewed. Manning waivers still may be granted in order to fulfill national defense interests.

27. N.Y. Times, May 25, 1987, at A3, col. 5.

28. N.Y. Times, May 29, 1987, at A1, col. 6.

29. N.Y. Times, July 19, 1987, at A12, col. 1.

30. A flag state has the right to protect its vessels from deprivation from other states. A.D. Watts, *The Protection of Merchant Ships*, 33 BRIT. Y.B. INT'L L. 52, 56 (1957). Whether this doctrine should necessarily be applicable in the present case is outside the scope of this discussion.

31. N.Y. Times, July 23, 1987, at A14, col. 1.

32. *See infra* notes 54-63 and accompanying text.

33. While ships are generally reflagged for economic reasons, the practice of reflagging for political reasons is not without precedents. During the war of 1812, American ships sailed under the Portuguese flag in order to protect themselves from British warships blockading the American coast. *Flags of Convenience—The 'Offshore' Registration of Ships*, in E. GOLD, NEW DIRECTIONS IN MARITIME LAW 85 (1978). Also, during Napoleon's continental blockade, English vessels were registered under the colors of tiny German principalities to avoid capture. BOCZEK, FLAGS OF CONVENIENCE 8 (1962). More recently, in 1969, during the Vietnam War, two former Taiwanese ships manned by Chinese crews were granted provisional U.S. registry, but that reflagging was called off after protests from labor unions. *See Reflagging Battle Goes International*, Journal of Commerce, June 15, 1987.

A. *Criteria for Establishing Nationality*

The oft-used term "the nationality of ships" connotes a legal relationship between a vessel and a country unlike that found between either a nation and any other tangible piece of property, or a nation and an individual.[34] It might better be termed a "pseudo-nationality" since the relationship between a ship and a state differs markedly from those more common relationships implied by the term "nationality."[35] This term is misleading when applied to ships in that it seems to suggest that a ship is subject to only one system of law—the law of the country in which it is registered or whose flag it flies. It must, however, be remembered that a ship is also a creature of international law, in that it is international law which provides for or excludes the manifestation of sovereign power with respect to ships.[36]

Under international law, each state "whether coastal or not, has the right to sail ships under its flag,"[37] and each state "may determine for itself the conditions on which it will grant its nationality to a merchant ship."[38] In general, there are only three limitations on the right to grant nationality. First, a state may not grant nationality to a ship where doing so would impinge upon the rights of other states. For example, a state is not allowed to impose its nationality upon vessels that already have, and desire to maintain, the nationality of another state.[39] Secondly, a state will not be allowed to grant its nationality to a ship if there is reasonable ground for suspicion that the ship will be used in violation of international law.[40] Finally, a state must choose a single nationality for its ships.[41] A ship which sails under the flag of two or more states may not lawfully claim any of the nationalities in question and, thus, may become a ship without nationality.[42] This is a particularly undesirable situation because, under international law, ships without nationality may be boarded by foreign warships.[43]

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34. Anderson, *Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, 13 J. MAR. L. & COM. 323, (1982).

35. BOCZEK, *supra* note 33, at 121.

36. For example, only warships and state owned or operated ships have complete immunity from the jurisdiction of any state other than the flag state. 1958 Geneva Convention on the High Seas (hereinafter cited as 1958 Convention), art. 8(1) and (9), 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82. *See also* O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 747 (1984).

37. The Barcelona Declaration, April 20, 1921, incorporating the Treaty of Versailles, 1919; in 1958 Convention, *supra* note 36, art. 4; 1982 Convention on the High Seas [hereinafter cited as 1982 Convention], art. 90, U.N. Doc. A/CONF. 62/161, U.N. Public Sales No. E.83.V.5.

38. Lauritzen v. Larsen, 345 U.S. 571, 584 (1983). *See also* Oppenheim, INTERNATIONAL LAW I, at 595 (8th ed., 1953).

39. BOCZEK, *supra* note 33, at 105-106.

40. *Id.*

41. 1982 Convention, *supra* note 37, art. 92(1).

42. 1958 Convention, *supra* note 36, art. 6.

43. A warship that encounters a foreign ship on the high seas may board such ship if

Because a great deal of reliance is placed on the individual state to promulgate its own criteria for granting nationality to a vessel, states usually have little difficulty in meeting the relatively minimal requirements requisite for recognition of ship nationality under international law. These requirements may be grouped under three headings: the flag, "genuine link" and registration. As the discussion below indicates, the satisfaction of only one of these criteria may be sufficient to establish nationality under international law, depending on the situation.

1. The Flag

"The law of the flag" as used in the field of maritime law has often been equated with the law arising out of a ship's nationality."[44] This usage tends to place undue emphasis on the importance of the flag in the determination of ship nationality. In actual practice, the flag of a ship is less than conclusive evidence of a vessel's national affiliation. The flag is simply the conventional way in which a vessel evidences its purported endowment with a nationality.[45] As such, the flag is generally accepted under international law as prima facie evidence of this.[46] It is not, however, conclusive proof.

2. "Genuine Link"

The 1958 Geneva Convention on the High Seas states that "there must be a genuine link between the State and the ship."[47] This test of nationality was not new. A similar concept had been adopted as early as 1896 by the Institut de Droit Internationale.[48] The term "genuine link", however, was borrowed directly from a decision of the International Court

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there is reason to believe that the ship is without nationality. 1958 Convention, *supra* note 36, art. 22; *see also* Naim Molvan v. Attorney-General for Palestine, 1948 A.C. 351.

44. The enunciation of the principle that the law which governs the regulation of a merchant ship on the high seas is "the law of the flag" first emerged in The Lamington, 87 F. 753 (1898). The "law of the flag" has been defined as "a concise phrase to express a simple fact, namely the law of the country to which the ship belongs and whose flag she bears." RIENOW, *supra* note 2 at 5, *citing* Brantford City, 29 F. 383 (1886).

45. O'CONNELL, *supra* note 36 at 757.

46. The Chiquita, 19 F.2d 417, 418 (1927).

47. 1958 Convention, *supra* note 36, art. 5. The 1982 Convention, *supra* note 37, repeats this criterion in nearly identical language in art. 91(1):

> Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. States have the nationality of the State whose flag they are entitled to fly. There must exist a *genuine link* between the State and the ship. (emphasis added)

The rest of the provision pertaining to the nationality of ships simply provides: "Each state shall issue to ships of which it has granted the right to fly its flag documents to that effect." Art. 91(2).

48. In 1896 the Committee on Usage of National Flags for Merchant Ships agreed that laws of certain countries concerning the nationality of ships ought not to dilute the criteria which most states had adopted. The Rules adopted by the Institut provide that as a condition of registration, a ship should be at least one-half the property of nationals of the country of registry or of nationally-owned companies. O'CONNELL, *supra* note 36, at 758.

of Justice holding that a state could refuse to recognize an individual's nationality when there is an absence of a genuine link between an individual and the state. In the *Nottebohm Case*[49] the court reasoned:

> . . . nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of fact that the individual upon whom it is conferred, either directly or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with any other State.[50]

The applicability of the court's holding in *Nottebohm* to cases involving ship nationality is questionable, since the holding was explicitly limited in scope to individuals.

The main problem with the application of the "genuine link" doctrine to ships is that frequently no concrete, exclusive connection can be established between a ship and a state because the vessel may be owned by a legal person, such as a multinational corporation, whose shareholders may be of many different nationalities.[51] Despite this difficulty, the proposition that the concept of "genuine link" is common to the problem of identifying people and ships arose in a dissenting opinion in the International Court of Justice. Judge Jessup, in his separate opinion to *Barcelona Traction*,[52] wrote:

> If a state purports to confer its nationality on ships by allowing them to fly its flag, without assuming that they meet such tests as management, ownership, jurisdiction, and control, other states are not bound to recognize the asserted nationality of the ship.[53]

The requirement is premised upon the belief that a state can carry out its obligation to exercise control over its ship only if such a genuine link exists.

The "genuine link" doctrine can be viewed as part of an international effort to restrict "flags of convenience."[54] This phrase covers flagging and

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49. Liechtenstein v. Guatamala, 1955 I.C.J. 1 (Nottebohm Case).

50. *Id.*

51. Boczek argues that the *Nottebohm* principle simply is unworkable when applied to ships. BOCZEK, *supra* note 33, at 122. He also contends that the requirement of certainty is much more important with respect to ships than with respect to individuals. *Id.* at 123. *Nottebohm* has been criticized for increasing uncertainty in international affairs. *See* Jones, *The Nottebohm Case*, 5 INT'L & COM. L. Q. 230, 244 (1956).

52. Case Concerning The Barcelona Traction Light and Power Company, Limited, 1970 I.C.J. 4.

53. *Id.* at 188.

54. "Flags of convenience" have also been called four other names: (1) They have been termed "flags of necessity" by shipowners who argue that such flags are essential in order to operate competitively. N.Y.Times, April 11, 1958, at A47; E.B. Shils and S. Miller, *Foreign Flags on U.S. Ships: Convenience or Necessity?*, 2 INDUS. REL. 131 (1963). (2) They have been termed "flags of survival" by military personnel who contend that they are necessary for military purposes. N.Y.Times, June 21, 1961, at A10, col.1. (3) They have been called

registration of ships in a country with which they otherwise have little or no connection in order to take advantage of that country's favorable laws and regulations. Although there is no specific reference to "flags of convenience" in the 1958 U.N. Conference on the Law of the Sea,[55] the debates and proceedings of the conference indicate that they were aimed at controlling such vessels.[56] Advocates of the "genuine link" doctrine frequently tie their arguments to attacks upon flags of convenience.[57]

Liberia, Panama, Singapore, and Cyprus are most often cited as culprits as regards flags of convenience.[58] While each of these nations offers different advantages to ship owners, six features which they have in common are: (1) access to registry is easy and inexpensive; (2) the country of registry allows owner-ship and/or control of its merchant vessels by non-citizens, and the owner enjoys almost complete secrecy of operations; (3) collective labor agreements are absent and there are no wage reporting requirements; (4) taxes on the income from the ships are not levied or are low; (5) manning of ships by non-nationals is freely permitted; (6) the country of registry does not have the power to impose international regulations upon vessels flying its flag.[59]

The title to a vessel which flies a flag of convenience is often held by a "paper" company incorporated under the laws of the nation of registry.[60] Individuals and companies in other countries, however, are the beneficial owners, receiving the profits and advantages while bearing little or

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"runaway flags" by maritime unions who describe such registration practices as attempts to run away from U.S. labor laws. Statement of Executive Secretary of AFL-CIO, in Study of Vessel Transfer, Trade-in and Reserve Fleet Policies: Hearings Before the Sub-committee on the Merchant Marine, 85th Cong., 1st Sess. 685, 694 (1957). (4) More recently, they have been termed "open registry fleets." UNCTAD adopts this terminology. *See* UNCTAD Secretariat, *Economic Consequences of the Existence of a Lack of a Genuine Link Between Vessel and Flag of Registry*, UNCTAD Doc. TB/B/C.4/168, at 53 (1977). [hereinafter cited as UNCTAD Report on Economic Consequences]. The term "open," however, inaccurately implies access and disclosure. Ship owners choose flags of convenience specifically because they allow secrecy of operations. Thus such flags cannot be characterized as "open." For this reason, and because "flags of convenience" is the most common term, "flags of convenience" will be used throughout this discussion.

55. 1958 Convention, *supra* note 36.

56. E. Osieke, *Flags of Convenience Vessels: Recent Developments*, 73 AMER. J. INT'L L. 604, 606 (1979).

57. For example, the 1984 Soviet Yearbook of Maritime Law argues: "Taking into account the widespread practice of 'flags of convenience' it is high time to establish more concrete inter-national law principles to ensure genuine jurisdiction of the flag State over each ship flying its flag in administrative, technical and social matters." 1984 SOVIET Y.B. MAR. L. 39.

58. *See* OECD Maritime Transport Committee, *Flags of Convenience*, *reprinted in* ILO Doc. JMC/21/4 (1972). For historical background on flags of convenience, see generally R. CARLISLE, SOVEREIGNTY FOR SALE: THE ORIGINS AND EVOLUTION OF THE PANAMANIAN AND LIBERIAN FLAGS OF CONVENIENCE (1981), and BOCZEK, *supra* note 33, at 26-63.

59. The listing was taken, in part, from a United Kingdom inquiry into shipping. Committee of Inquiry into Shipping, Report 51 (1970) [Rochdale Committee Report].

60. An UNCTAD report calls these companies "brass plate companies." *Action on the Question of Open Registry*, UNCTAD Doc. TD/B/C.4/220 (March 3, 1980).

no responsibility for the problems arising from daily operations. Operators of ships flying a flag of convenience can often avoid public inquiry and prosecution because they reside outside the flag state and have no assets there. If their identity becomes known, they can erase their bad reputation by simply changing the name of their company or ship.[61] In 1980, the United Nations Conference on Trade and Development (UNCTAD) produced a report analyzing the true beneficial owners of ships with this type of registry.[62] According to the report, about one-third of all tonnage considered to be sailing under a flag of convenience is controlled by U.S. interests.

Both UNCTAD and the International Labor Conference (ILO)[63] support the "genuine link" doctrine as a means of restricting "flag-of-convenience" (or open-registry) fleets. UNCTAD contends that the expansion of open-registry fleets has adversely affected the development and competitiveness of fleets of countries which do not offer open-registry provisions, and has endangered the orderly and safe development of international trade.[64] In contrast, the international labor movement opposes flags of convenience because safety and labor conditions aboard such ships are extremely poor.[65] In support of both claims, commentators have presented data indicating that fleets operating under a flag of convenience are more likely to suffer serious losses at sea.[66] As an example, consider that according to *Lloyd's Register of Shipping*, Greece, Liberia

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61. Sinan, *supra* note 4 at 103.

62. UNCTAD Report, *supra* note 60.

63. The ILO seeks to promote higher labor standards in international merchant shipping. *See* F.L. Wiswall, *The ILO at Sea*, 3 CORNELL INT'L L.J. 153, 154 (1970).

64. *See* Conditions for the Registration of Ships, UNCTAD Doc. TD/B/AC (Jan. 22, 1982), *reprinted in* 4 OCEAN Y.B. 492 (Borgese and Ginsburg, eds. 1982). UNCTAD would require that states adopt an internationally acceptable and agreed definition of what constitutes a genuine link. UNCTAD Report on Economic Consequences, *supra* note 54, at 5, 7 and 12.

65. The ILO has actively opposed flags of convenience since 1933. E. Argiroffo, *Flags of Convenience and Substandard Vessels: A Review of the ILO's Approach to the Problem*, 110 INT'L LAB. REV. 437, 439 (1974). The ILO has adopted two international labor recommendations concerning the enforcement of safety laws, social security measures abd standards of competency aboard vessels which fly flags of convenience: the Seafarer's Recommendation (No. 107) and the Social Conditions and Safety Recommendation (No. 108). *Id.*, at 446-455. International maritime unions have challenged flags of convenience through strikes, boycotts and legislative action. *See e.g.*, Ewing, *Union Action Against Flags of Convenience—The Legal Position in Great Britain*, 11 J. MAR. L. & COM. 503 (1980); Note, 16 J. MAR. L. & COM. 423 (1985) [strike by the International Transport Workers Federation against flag-of-convenience ship held unlawful]; Note, *The Effect of United States Labor Legislation on the Flag of Convenience Fleet*, 69 YALE L. J. 498, 502-503 (1969) [U.S. maritime unions oppose flags of convenience].

66. *See* U.S. Department of Transportation, United States Coast Guard, Technical Memorandum No. MMI-3, 866-5-1 (March 29, 1986); S. Bergstrand and R. Doganis, *The Impact of Flags of Convenience*, in THE LAW OF THE SEA AND INTERNATIONAL SHIPPING: ANGLO-SOVIET POST-UNCLOS PERSPECTIVE 421-424 (W.E. Butler, ed. 1985); Transportation Institute Memorandum, *The Safety of U.S.-Flag Ships Compared to Flag of Convenience Ships*, (October 19, 1977).

and Panama together accounted for 40.93% of the losses at sea in 1984.[67]

Disasters caused by ships with this type of registry have increased public awareness of the dangers presented by flags of convenience. In 1978, the *Amoco Cadiz*, a tanker registered in Liberia, spilled nearly all of its 230,000 tons of light crude oil onto the high seas and the French coast in Brittany.[68] Eleven years earlier, the *Torrey Canyon*, another flag of convenience ship, spilled half of its cargo of 117,000 tons of Kuwaiti oil on the beaches of Brittany and Cornwall.[69] The United States is not without its own share of tragedies. The Liberian-flagged *Argo Merchant* broke apart off Nantucket in December, 1976, spilling 7.5 million gallons of oil into New England fishing waters.[70]

Ironically, these disasters have prompted international organizations to move away from attempts to directly prohibit flags of convenience. Instead, the international community has focused upon the problems arising under the operations of substandard vessels[71] generally, regardless of whether they sail under flags of convenience.[72] For example, both the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,[73] and the 1969 International Convention on Civil Liability for Oil Pollution Damage[74] were prompted by the *Torrey Canyon* incident.[75]

Unfortunately, the use of the genuine link doctrine to limit the number of vessels flying flags of convenience has failed to have significant influence upon the maritime industry. There has been no consensus among states that the provisions of Article 5 of the Geneva Convention on the High Seas should govern their relations in determining the nationality of ships.[76] Flag-of-convenience fleets have expanded rapidly,[77] and presently

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67. SAMIR MANKABADY, THE INTERNATIONAL MARITIME ORGANIZATION: ACCIDENTS AT SEA 27 (1987) [hereinafter cited as MANKABADY, IMO VOL. 2].

68. The Sunday Times (London), March 19, 1978, at 1, col.1 and 2, col. 2.

69. The *Torrey Canyon* disaster caused 18 million dollars worth of damages. A. Mendelsohn, *The Public Interest and Private International Maritime Law*, 10 WM. & MARY L.R. 783, 788 (1969). *See also* Brown, *The Lessons of the Torrey Canyon*, 21 CURRENT LEGAL PROBS. 134 (1968).

70. The Transportation Institute, *Flags of Convenience: An American View*, at 1 (1978).

71. The term "sub-standard" ships refers to those of unsound structure, ill equipped, badly operated, or having incompetent crews. It is estimated that 5% of the world's tanker fleet could be termed sub-standard. MANKABADY, IMO VOL.2, *supra* note 69, at 35, n.2.

72. Osieke, *supra* note 56, at 626.

73. 64 A.J.I.L. 471 (1970) [convention affirms the right of coastal states to take such measures on the high seas as may be necessary to prevent, mitigate, or eliminate danger, or threat of danger to coastline; provides provisions for settling disputes by means of negotiations, conciliation, and arbitration].

74. *Id.* at 481 (placing liability on the owner of the ship transporting oil).

75. *See* Mendelsohn, *supra* note 69.

76. Osieke, *supra* note 56, at 607.

77. *See* THE INTERNATIONAL SHIPPING FEDERATION, GUIDE TO INTERNATIONAL SHIP REGISTERS (1987) [hereinafter cited as ISF GUIDE]; *See also* Transportation Institute Transport Studies Group Discussion Paper No.8, *Flags of Convenience in 1978*, at 3-24 (November,

Liberia and Panama, two of the worst flag-of-convenience offenders, command the largest merchant fleets in the world.[78] Fleets operating under flags of convenience now account for one-third of the world's tanker tonnage as well as one-third of the world's bulk oil carriers.[79] This demonstrates that the "genuine link" doctrine is, at least in its traditional form, widely ignored.

Perhaps states find the "genuine link" requirement so easy to ignore because the U.N. Conventions on the Law of the Sea[80] contain no provisions indicating the consequences of registration when no genuine link exists. In fact, the Conventions do not enable a state to withhold recognition if it believes that no link exists. Article 94(6) of the Law of the Sea merely provides that a state "which has clear grounds to believe that a proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag state," which has a duty to investigate.[81] Also, the "genuine link" requirement may be avoided because it not defined. Even though early drafts of the International Law Commission attempted to define "genuine link," by requiring ownership by nationals and manning by national officers,[82] the final draft failed to do so.

The International Court of Justice has also failed to actively support the "genuine link" requirement. It declined to apply the *Nottebohm*[83] principle to ships when the opportunity arose in the *IMCO* Case.[84] In *IMCO*, the Court advised that Liberia and Panama should be eligible for membership in the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (IMCO).[85] The Court reasoned that the term "largest ship-owning nations" in Article 28(a) of the IMCO Convention referred to registered tonnage and not beneficially owned tonnage. After the *IMCO* opinion, there can be little doubt that irrespective of ownership, registration alone is sufficient to determine the nationality of ships as far as international law is concerned.[86]

U.S. courts similarly have rejected a "genuine link" test which would define nationality by ownership. For example, in *Grivas v. Alianza Com-*

1978).

78. Important statistical data on the major merchant fleets of the world, as of July 1, 1986, are summarized in 31 ALMANAC OF SEAPOWER 235 (1988).

79. GOLD, *supra* note 33, at 89. *See also* LLOYD'S REGISTER OF SHIPPING (1987).

80. *See* 1958 Convention, *supra* note 36, art. 52; 1982 Convention, *supra* note 37, art. 91.

81. 1982 Convention, *supra* note 37, art. 94(6).

82. 1951 Y.B. INT'L L. COMM'N 330-32; U.N. Doc. A/CN.4/4 Ser. A/1953.

83. *See* Nottebohm Case. *supra* note 49.

84. 1960 I.C.J. 150.

85. In 1982, the IMCO became known as the International Maritime Organization (IMO). SAMIR MANKABADY, THE INTERNATIONAL MARITIME ORGANIZATION 2 (1984) [hereinafter cited as MANKABADY, IMO VOL.1].

86. A similar observation was made in Sinan, *supra* note 4, at 98. However, Sinan wrote that "the flag determines the responsibility of states as far as the enforcement of international law is concerned." As stated, Sinan's observation is misleading because the flag alone does not establish nationality. *See supra* notes 44-46 and accompanying text.

pania Armadora, S.A.,[87] the ship was registered in Liberia but owned by a Panamanian corporation. The plaintiffs sought to have the Panamanian Labor Code applied. The court, however, rejected jurisdiction by ownership, concluding that the fact that the vessel was owned by a Panamanian corporation did not in itself entitle the crew to the benefits of the Panamanian Labor Code.[88]

While at least some Eastern European states require a "genuine link"[89] in its traditional sense, most states do not follow the same practice. In fact, only one of the elements that has been traditionally thought to establish a genuine link for purposes of ship nationality has been consistently required under international law-registration. The use of the place of the vessel's construction to establish a link has become, for all practical purposes, anachronistic.[90] While many states have some manning requirements, evidence of a national crew is neither necessary nor sufficient to establish nationality.[91] Similarly, as the *IMCO* Case demonstrates,[92] there is no necessary correlation between ownership and nationality.[93] Registration, accompanied by the appropriate documents, is the only "genuine link" required to establish nationality under international law.

3. Registration

Registration falls within the jurisdiction of the individual nation, and, therefore, requirements and procedures for this process vary from

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87. 150 F.Supp. 708 (S.D.N.Y. 1957).

88. *Id.* at 712. For a similar case, see Evangelinos v. Andreavapor Compania Naviera, S.A., 162 F.Supp 520, 521 (S.D.N.Y. 1958). In holding that foreign seamen aboard flag-of-convenience ships were not entitled to the protection of U.S. labor laws, the U.S. Supreme Court further rejected an ownership test in McCulloch v. Sociedad Nacional de Marineros, 372 U.S. 10, 83 S.Ct. 614, 9 L.Ed.2d 541 (1963) and in Incres S.S. Co. v. Int'l Maritime Workers Union, 372 U.S. 24, 83 S.Ct. 611, 9 L.Ed.2d 557 (1963) (seamen not entitled to protection of Labor Management Relations Act, although 40% of the vessels were owned by Americans and these ships carried one-third of the United State's foreign trade in 1958). *See* Currie, *Flags of Convenience: American Labor and the Conflict of Laws*, 1963 SUP. CT. REV. 34.

89. The Soviet Union requires a substantial link in order to sail under Soviet nationality. Under Soviet law, the right to fly a USSR flag is granted to vessels owned by the state, by collective farms or other state cooperative organizations, or by Soviet nationals. Upon registration, vessels are issued papers attesting the right to sail under the flag of the USSR. Only Soviet nationals may be crew members aboard Soviet-flagged ships, except under extraordinary circumstances. BUTLER, THE SOVIET UNION AND THE LAW OF THE SEA 174 (1971), *citing* articles 22, 23, 26, 30-33 and 41 of the Merchant Shipping Code of the USSR.

90. RIENOW, *supra* note 2, at 24-49.

91. *Id.* at 216. States continue to have manning requirements for economic reasons (to promote employment for nationals) and for military reasons.

92. 1960 I.C.J. 150; *see supra* notes 73-76 and accompanying text.

93. Rienow states: "[T]he bare fact of national ownership does not impress upon a vessel a closer connection with the state of the owner's nationality than with any other state." RIENOW, *supra* note 2, at 116.

state to state.[94] Most states make general disclosure requirements regarding such things as the ownership of the vessel, the type of the vessel and its exact specifications, the age of the vessel, and its inspection history.[95] It is commonly recognized that it is the act of registration which results in the granting of a flag to a vessel.

Early treaties expressly stipulate the particular conditions under which parties would recognize the nationality of each other's vessels.[96] On the other hand, more recent treaties provide for reciprocal flag recognition on the basis of valid registration documents. The United States' standard flag recognition clause today reads:

> Vessels under the flag of either party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that party both on the high seas and within its ports, places and waters of the other party.[97]

The U.S.S.R. uses similar language in its treaties:

> The nationality of vessels shall be reciprocally recognized in accordance with the law and enactments of the two contracting parties on the basis of the documents and certificates on board the vessel issued by the proper authorities of either contracting parties.[98]

Under both of the texts, the focus is upon registration. No reference is made to the question of who owns the ship, by which country's nationals it is manned, or where it was built.[99]

In the absence of a treaty, under international law evidence of registration is both necessary and sufficient to establish nationality.[100] The U.S. Code of Regulations specifically recognizes that a certificate of documentation is "conclusive evidence of nationality for international pur-

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94. For a comparison of the registration requirements of the United States, Liberia, and Panama, see E. GOLD & N.G. LETALIK, NEW DIRECTIONS IN MARITIME LAW 262-290 (1980) (reprinting sections of each country's statutes pertaining to registration of ships).

95. For a review of U.S. documentation procedures, see Drzal and Carnilla, *Documentation of Vessels: The Fog Lifts*, 13 J. MAR. L. & COM. 261 (1982).

96. For flag recognition clauses in bilateral treaties up to 1937, see RIENOW, *supra* note 2, at 19-21 and 167-170.

97. BOCZEK, *supra* note 33, at 98, n. 23, *citing*, *e.g.* treaties of FCN: With China, Nov. 4, 1946, art. XXI, 63 Stat. (2) 1299; T.I.A.S. 1871, 2 U.N.T.S. 69. With Italy, Feb. 2, 1947, art. XIX; 63 Stat. (2)2255; T.I.A.S. 1965; 79 U.N.T.S. 171. With Ireland, Jan. 21, 1950, art. XVIII(2); 1 U.S.T. 785; T.I.A.S. 2155. With Japan, April 2, 1953, art. XIX; 4 U.S.T. 2063; T.I.A.S. 2863. With Israel, Aug. 23, 1951, art. XIX; 5 U.S.T. 50; T.I.A.S. 2948.

98. *Id.*

99. It is interesting to note that the U.S. has flag recognition provisions with Honduras and Liberia, two of the main flag of convenience states. These provisions were one of the main arguments put forward by some of the International Law Commission against making recognition of a vessel's nationality dependent upon a "genuine link." BOCZEK, *supra* note 33, at 99, n.26, *citing* Treaty of Friendship, Commerce & Consular Rights with Honduras, December 7, 1927, art. X; 45 Stat. 2618; T.S. 764; 87 L.N.T.S. 421. Treaty of FCN with Liberia, August 8, 1938, art. XV; 54 Stat. 1739; T.S. 956; 201 L.N.T.S. 163.

100. N. SINGH, MARITIME FLAG AND INTERNATIONAL LAW 40 (1977); BOCZEK, *supra* note 33, at 106; RIENOW, *supra* note 2, at 154.

poses."[101] A ship without documents to establish nationality is treated as being without nationality, even if the ownership of the vessel may be established.[102] Thus, the country of registration remains the single, essential criterion for determining the nationality of a ship.

B. Was the Re-registration of the Kuwaiti Tankers Sufficient to Confer U.S. Nationality?

According to the criteria discussed above, the Kuwaiti tankers need only be properly registered under U.S. law in order to legally sail under the American flag. Under international law, if the Kuwaiti vessels carry documentation evidencing American registration, issued by competent authorities, then they are to be considered American ships. This relatively minor requirement was met in the present case.

Under U.S. law, vessels of at least 5 net tons[103] are eligible for documentation if two main requirements are met. First, the vessels must meet the inspection requirements provided by the Coast Guard.[104] This requirement was satisfied because U.S. law also allows violations to be waived if national defense concerns are present.[105] The Coast Guard inspected each ship on site[106] and granted national defense waivers for violations of U.S. law that did not constitute "manifestly unsafe conditions."[107]

Second, the vessels must meet ownership requirements. In order to trade overseas,[108] a vessel must be owned by an individual who is a U.S. citizen, partnership whose general partners are U.S. citizens, or corporation organized and chartered under the laws of the United States.[109] If

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101. 46 U.S.C. § 12104(1) (1987) provides that while a certificate of documentation issued under U.S. laws is conclusive evidence of nationality for international purposes, it is not conclusive evidence in any proceeding conducted under the laws of the U.S.

102. *See, e.g.*, The Merritt, 84 U.S. (17 Wall.) 582, 587 (1873) (American-owned, foreign-built ship without any documents could not establish nationality and thus was "entirely destitute").

103. 46 U.S.C. § 12102 (1987).

104. 46 U.S.C. § 3301 - *et. seq.* (1987). 46 U.S.C. § 3705 (1987) details specific standards applicable to oil tankers. In addition, regulations have been issued pursuant to 46 U.S.C. § 3306 (1987). U.S. Coast Guard Navigation and Inspection Circular No. 10-81, dated October 5, 1981, contains the requirements for foreign flag vessel brought under the U.S. flag.

105. Such waivers are granted under 46 C.F.R. § 6.01.(1987) and 46 App. U.S.C. Note prec. 1 (1958) (Act of December 27, 1950). *See supra* notes 12-15, and accompanying text.

106. N. Y. Times, July 17, 1987, at B8, col. 6; N. Y. Times, August 9, 1987, at A12, col. 3.

107. May 21 Coast Guard Letter, *supra* note 20.

108. The distinction between overseas trade and coastal trade is crucial because the Shipping Act of 1916 independently imposes further requirements concerning the citizenship of owners of vessels engaged in coastal trade. 46 U.S.C. §§ 802 & 808 (1959). *See* Drzal & Carnilla, *supra* note 95 at 265. In addition, vessels which engage in coastal trade must be built in the United States. On the other hand, ships engaging in foreign trade may be built anywhere. 46 U.S.C. § 12105(d) (1987).

109. 46 U.S.C. § 12102 (1987). In comparison, under Panamanian law, there are no

the vessel is owned by a corporation, the chief executive officer, chairman of the board of directors, and a majority of the directors must be U.S. citizens.[110] The equity ownership in a U.S. flag vessel registered for foreign trade need not be held by American citizens unless the United States is at war, or the President has declared a national emergency. Were that to be the case, a majority of the interest in the corporation would have to be owned by Americans.[111]

The Kuwaiti government satisfied the ownership requirement by establishing a "paper corporation," Chesapeake Shipping, Inc., to act upon its behalf.[112] The equity interest in Chesapeake Shipping is not owned by Americans. This is not a fatal defect because, while the Administration was seeking waiver of inspection rules based on "national defense," it did not go so far as to declare a "national emergency." A House of Representatives report analyzing this problem noted that "[a] 'national emergency' declaration would trigger a shift in equity ownership of the Kuwaiti tankers."[113] Under the present circumstances, however, Chesapeake Shipping is in apparent compliance with the ownership requirement.

In sum, because the Kuwaiti tankers met the United States's requirements for registration, they were properly issued certificates of documentation.[114] The fact that the Kuwaiti tankers have little connection to the United States is irrelevant. Under international law, these certificates of documentation are conclusive evidence of nationality.[115] Thus, the vessels had the right to carry the U.S. flag.

IV. STATE RESPONSIBILITY IN THE SAILING OF FLAGGED VESSELS

Every state has the right to have ships fly its flag on the high seas.[116] However, all rights of an international character involve international responsibility. Consideration for the rights of other states requires that flag states observe international rules relating to environmental protection, the protection of human life at sea, and safety in navigation.[117] The vast majority of states, including many of those associated with fleets sailing under flags of convenience, agree that they have a general obligation to sail safe ships.[118] This general acknowledgement is evidenced by the fact

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ownership requirements. GOLD & LETALIK, *supra* note 94, at 282.

110. 46 U.S.C. § 12102(4) (1987).

111. House Memorandum, *supra* note 9, at 11.

112. *See supra* note 18 and accompanying text.

113. House Memorandum, *supra* note 9, at 11. The Report further observed that "[i]t may be possible that invoking the War Powers Act, as Congress has asked, would be tantamount to declaring a national emergency."

114. 46 U.S.C. § 12103 (1987) (certificates of documentation).

115. *Supra* note 100 and accompanying text.

116. 1982 Convention, *supra* note 37, art. 87.

117. Limitone, *The Registration of Ships by International and International Organization*, 2 SEA GRANT BULLETIN 4-5 (1971).

118. *See* Transportation Institute discussion paper No. 8, *supra* note 77, at 58. For evidence of the international emphasis placed upon safety of life at sea, see Law of the Sea,

that the largest fleets which are considered to fly flags of convenience, including those of Panama, Liberia and Cyprus, have ratified the key international conventions pertaining to safety at sea.[119]

While it is perhaps difficult to point to precise, uniform safety obligations, the norm of sailing safe ships is not completely devoid of concrete content. Rather, the duties arising out of this norm are set forth both in multilateral conventions and through customary international law. Obligations articulated in conventions and the customary rules of navigation and safety attempt to regulate the use of the seas.[120] The flag state's failure to comply with the requirements of the conventions and customary laws could conceivably make them liable internationally to injured states.[121] The interrelationship of these specific sources of the law of the sea creates a general obligation to sail safe ships.[122] This section details states' obligations in sailing vessels and determines whether such obligations were met with respect to the Kuwaiti oil tankers.

A. *Obligations of State Sailing a Flagged Vessel*

The obligations of states sailing flagged vessels arise out of a basic principle of the law of the sea: freedom of the sea.[123] In recognition of the sovereign equality of states, "all nations have an equal right to the uninterrupted use of the unappropriated parts of the ocean for navigation."[124] The doctrine, as it has evolved through custom, is contained in Article 87

Report of the Secretary-General, November 27, 1985, U.N. Doc. A/40/923 (1985), *reprinted in* 1 INTERNATIONAL AND U.S. DOCUMENTS ON OCEANS LAW AND POLICY, at Part A (J.N. Moore ed. 1986).

119. Panama, Liberia, Isle of Man, Hong Kong, Cyprus, Malta, Vanuatu and Singapore have all ratified the U.N. Convention for Safety of Life at Sea. ISF Guide, *supra* note 77. In addition, Liberia, Hong Kong, Cyprus and the Bahamas have adopted the International Convention on Standards of Training, Certification and Watchkeeping. *Id. See infra* note 155 and accompanying text.

120. Limitone, *supra* note 117, at 5.

121. *Id., citing* McDOUGAL & BURKE, *supra* note 2, at 1081-82. The main international convention pertaining to liability for maritime claims is The International Convention relating to the Liability of Owners of Sea-Going Ships, October 10, 1957, *entry into force*, 1968 U.N.T.S. 52; *reprinted in* SINGH, 4 INTERNATIONAL MARITIME LAW CONVENTIONS 2976 (1983) (hereinafter cited as Singh Conventions). For a discussion on the potential liability of flag states, see MANKABADY, IMO VOL. 2, *supra* note 67, at 68-115.

122. Eduardo Jimenez de Arechaga has noted that one of the principle features of the lawmaking process in contemporary international law is the simultaneous interplay of its sources. EDUARDO JIMENEZ DE ARECHAGA, *International Law in the Past Third of a Century*, 1978 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 1 (vol. 1).

123. *See* 1984 SOVIET Y.B. MAR. L. 32; TOWARD A NEW INTERNATIONAL MARINE ORDER 2 (Laursen, ed. 1982); P.S. RAO, THE PUBLIC ORDER OF OCEAN RESOURCES: A CRITIQUE OF THE CONTEMPORARY LAW OF THE SEA 154-156 (1975)(Freedom of the seas and conflicting uses); SCIENTIFIC AND TECHNICAL REVOLUTIONS AND THE LAW OF THE SEA 7 (M. Frankowska, ed. 1974); McDougal & Burke, *Crisis in the Law of the Sea: Community Perspective v. National Egotism*, 67 YALE L. J. 539, 547 (1958)(compromise between demands of coastal and non-coastal states).

124. Le Louis, 2 Dod. Adm'y Rep. 210, 244 (1817).

of the U.N. Convention on the Law of the Sea, which states:

> The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It compromises, inter alia, for both coastal and land-locked states:
>
> (a) Freedom of navigation;
>
> (b) Freedom of overflight;
>
> (c) Freedom to lay submarine cables and pipelines. . .
>
> (d) Freedom to construct artificial island. . .
>
> (e) Freedom of fishing. . .
>
> (f) Freedom of scientific research. . .[125]

The Convention emphasizes that freedom of the high seas must be exercised "with due consideration for the interests of other States in their exercise of freedom of the high seas. . ."[126]

If freedom of the high seas is to exist, it is necessary that international rules are followed in order to alleviate conflicting or dangerous uses of the oceans. International cooperation is more necessary today because shipping has become an industry which greatly effects the quality of life of the world community. One commentator succinctly noted: "Shipping is no longer a personal affair dependent upon a brave captain."[127] The large fleets of today carry a considerably larger amount of dangerous cargo than did the ships of yesterday. As a result, the problem of safety at sea has expanded from the concern for the well-being of a few to concern for safety of the entire human race.

The number of disasters at sea are astonishing. According to Lloyd's Register of Shipping, in 1984 marine losses amounted to 161 vessels, a total of 2.3 million tons gross.[128] Between 1968 and 1980, over 1,593 lives were lost at sea due to shipping disasters.[129] These numbers do not reveal the true dimensions of the problem. Disasters at sea have a much wider impact when social, economic, and ecological factors are taken into account. Professors McDougal and Burke have noted that it is in states' self-interest to cooperate with others in the use of the oceans. They write that:

> States concerned for their long-term national interest might be better advised not to destroy their equality of access to inclusive uses of the oceans, but to increase their effective capacity for the fuller enjoyment of their common existing rights.[130]

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125. 1982 Convention, *supra* note 37, art., 87(1) (items (c) through (f) are subject to limitations set forth in the Convention).

126. *Id.* art. 87(2).

127. MANKABADY, IMO VOL. 1, *supra* note 85, at 174.

128. MANKABADY, IMO VOL. 2, *supra* note 67, at 27.

129. *Id.* at 175.

130. MCDOUGAL & BURKE, *supra* note 123, at 589.

Without international cooperation, the problems of safety at sea cannot be solved or even substantially reduced.[131] In an attempt to alleviate this problem, states have set forth safety obligations in both international and domestic regulations.

1. International Standards

The starting point for determining the content of international norms pertaining to safety at sea is the U.N. Convention on the Law of the Sea,[132] the basic source of international law of the sea.[133] The provisions of the Convention have been grouped into three categories:

> (1) provisions that codify or restate the existing law of the sea, either customary or conventional; (2) provisions that clarify, redefine or make more precise what has already been implicit in international law or related developments; and (3) new, unique or unprecedented provisions.[134]

Which provisions fall into each category is often a subject of controversy.[135] Still, the main provision relating to the responsibilities of flag states, Article 94, merely restates previously existing principles which are corollary to the long-standing principle of freedom of the seas.[136] Such

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131. For agreement with this proposition, see MANKABADY, IMO VOL. 1, *supra* note 85, at 176.

132. The U.N. Conventions have a long history. First, the League of Nations produced the Acts of the Conference for the Codification of International Law on August, 19, 1930. Minutes of the Second Committee, League of Nations Conference for the Codification of International Law Vol. IV, Doc. C. 351 (b). M. 145 (b). 1930 V (1930); *reprinted in* 24 AM. J. INT'L. L. 234-53 (supp. 1930). The United Nations held the First Conference on the Law of the Sea in 1958 and adopted the Convention on the High Seas. 1958 Convention, *supra* note 36. This Convention has been substantially revised twice, first in 1960 and, most recently, in 1982. *See* Second U.N. Conference on the Law of the Sea, Final Act of Conference, April 26, 1960, UNCLOS III, OFFICIAL RECORDS 175, U.N. Doc. A/CONF.19/L.15 (1960); 1982 Convention, *supra* note 37.

For a convenient summary of the issues surrounding UNCLOS III, see G. M. White, *Unclos and the Modern Law of Treaties: Selected Issues,* in W.B. BUTLER, THE LAW OF THE SEA AND INTERNATIONAL SHIPPING: ANGLO - SOVIET POST UNCLOS PERSPECTIVE 15-37 (1985).

133. Many commentators agree that apart from provisions concerning the utilization of the seabed and possibly those related to dispute resolution, UNCLOS is the best evidence of the current state of customary international law. J. N. Moore, *Customary International Law After the Convention,* in THE LAW OF THE SEA INSTITUTE, THE DEVELOPING ORDER OF THE OCEANS, at 41 (1984). *See also* Bruce Harlow, *Commentary, id.* at 62; BUTLER, *supra* note 132, at 3-14. For a discussion of the deep seabed mining controversy that has caused conflicts in Third U.N Conference on the Law of the Sea, see PERSPECTIVES ON U.S. POLICY TOWARD THE LAW OF THE SEA: PRELUDE TO THE FINAL SESSION OF THE THIRD U.N. CONFERENCE ON THE LAW OF THE SEA (C.L.O. Buderi, D.D. Caron, eds. 1985).

134. T. Treves, *The United Nations Law of the Sea Convention of 1982: Prospects for Europe,* in GREENWICH FORUM, BRITAIN AND THE SEA: FUTURE DEPENDENCE, FUTURE OPPORTUNITIES 6 (1983).

135. *Id.* at 5-6.

136. Notably, this provision was accepted without controversy at the U.N. Law of the Sea Conferences. Instead, disputes have focused on the question of fishing zones, seabed mining, and the limits of the territorial sea. *See* CLYDE SANGER, ORDERING THE OCEANS: THE

principles are reflected in numerous treaties and have been adopted by many states. Therefore, Article 94 may be regarded as falling into either the first or second category.[137]

Article 94 of the U.N. Convention on the Law of the Sea enumerates the administrative, technical, and social matters over which the flag state should exercise effective control. In particular, the Convention states:

> Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:
> (a) The construction, equipment and seaworthiness of ships;
> (b) The manning of ships, labor conditions and the training of crews, taking into account the applicable international instruments;
> (c) The use of signals, the maintenance of communications and the prevention of collisions.[138]

The flag state also must ensure that each vessel is surveyed by a qualified surveyor of ships, that each ship is in the charge of a master who possesses the proper qualifications, and that the crew is appropriate in qualifications and in number.[139] In fulfilling the requirement of Article 94, each state is required to "conform to generally accepted international regulations."[140]

The U.N. Convention on the Law of the Sea has had a profound effect both upon conventional and customary international law pertaining to safety.[141] Guided by the Convention, the Intergovernmental Maritime Organization (IMO)[142] has promoted several maritime safety measures

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MAKING OF THE LAW OF THE SEA 13-22, 40-55 (1987). The United States has taken the position that virtually every provision outside the seabed mining section is already customary law and, thus, needs no convention or treaty to add to the body of international law. *Id.* at 106. While the United State's position has met with great opposition, many states do agree that the sections pertaining to state responsibilities and freedom of the high seas are part of customary international law. Tullio Treves, *The U.N. Convention on the Law of the Sea as a Non-Universally Accepted Instrument: Notes on the Convention and Customary Law*, in A.W. KOERS & B.H. OXMAN, THE 1982 CONVENTION ON THE LAW OF THE SEA 685 (1983).

137. Treves, *supra* note 136, at 688. The implication of this observation is that not all states have to sign the latest Convention on the Law of the Sea for Article 94 to become binding on all states. As of this writing, the 1982 Convention has been signed by a sizable number of states, but ratified by only a few. *Id.* at 685. The phenomenon of rules set forth in a treaty becoming binding on third states as customary rules of international law is recognized by the Vienna Convention on the Law of Treaties (Art.38) and the International Court of Justice in North Sea Continental Shelf, 1969 I.C.J. 41.

138. 1982 Convention, *supra* note 37, art. 94(3).

139. 1982 Convention, *supra* note 37, art. 94(4). *See also* the 1958 Convention, *supra* note 36, especially Articles 5, 10, and 12.

140. 1982 Convention, *supra* note 37, art. 94(5).

141. *See* Budislav Vukas, *The Impact of the Third United Nations Conference on the Law of the Sea on Customary Law*, in THE NEW LAW OF THE SEA (C.L. Rozakis & C.A. Stephanou, eds. 1983).

142. The IMO is an agency of the U.N. which promotes the safety of maritime shipping through three different instruments: conventions, resolutions and codes. Only conventions, when ratified, are binding. Nevertheless, in practice, resolutions may carry more weight than certain conventions, and some of the codes are incorporated into national law.

which have found a very great measure of acceptance. An international conference convened under its auspices adopted the International Convention and Regulations for the Safety of Life at Sea (SOLAS),[143] which contains detailed provisions about the minimum standards for construction of ships and the safety precautions to be maintained on board. The Convention also details inspection procedures, grants authority to flag states to investigate any casualty involving their ships, and authorizes port states to prevent ships not meeting the Convention's standards from leaving their ports. The Convention has been ratified by most of the major shipping nations including Panama, Cyprus, Liberia, USSR, Greece and the United States.[144]

A set of safety regulations which has gained even greater acceptance are the IMO's Collision Regulations ("The Rules").[145] The Rules have been adopted by 95 countries, the aggregate of whose merchant fleets constitute approximately 95% of the gross tonnage of the world's merchant fleet.[146] The Regulations consist of 38 detailed requirements applying to steering, sailing, lighting and sound and light signals. The Rules' primary objective is to prevent accidents by minimizing the risk of collision, and their secondary objective is to set up standards of conduct for navigating officers.[147] These objectives can be achieved only through a precise and uniform application. For this reason, the IMO has adopted its "Guidance for the Uniform Application of Certain Rules" of the Collision

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MANKABADY, IMO VOL. 1, *supra* note 85, at 1.

143. This Convention has seen many revisions: International Convention for the Safety of Life at Sea, London, June 17, 1960, *entered into force*, May 26, 1965, 536 U.N.T.S. 27; International Convention for the Safety of Life at Sea, London, November 1, 1974, *entered into force*, May 24, 1980, *reprinted in* 14 I.L.M 963; Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, London, February 17, 1978, *entered into force* May 1, 1981, reproduced from IMCO Document TSPP/CONF/10/Add.1, in MOORE, *supra* note 118, at 324; 1981 Amendments to Protocol, London, November 1981, entry into force September 1, 1984, *reprinted in* IMO STAT. OF MULTILATERAL CONVENTIONS 29 (1984).

The 1960 SOLAS built upon the work of many previous safety of life at sea conventions. As a result of *The Titanic* incident, the first convention was adopted in 1914. MANKABADY, IMO VOL. 1, *supra* note 85, at 29.

144. ISF GUIDE, *supra* note 77; *see also* International Convention for the Safety of Life at Sea in MOORE, *supra* note 118, at part B.

145. Convention on the International Regulations for Preventing Collisions at Sea, London, October 20, 1972, *entered into force*, July 15, 1977, U.N. Registration No. A-15824; Cmnd. 6962; *reprinted in* SINGH, CONVENTIONS, *supra* note 121, at 3 (Vol. 1); QUENEUDEC, CONVENTIONS MARITIMES INTERNATIONALES 287 (1979). *See also* 1981 Amendments to Convention, London, November 19, 1981, entry into force, June 1, 1983, IMO Resolution A.464 (XII), in IMO STAT. OF MULTILATERAL CONVENTIONS 31 (1984).

146. Countries which have adopted the rules include Canada, Cyprus, Czechoslovakia, France, German Democratic Republic, German Federal Republic, Greece, Honduras, Israel, Italy, Japan, Kuwait, Liberia, Panama, Republic of Korea, Singapore, Saudia Arabia, USSR, United Kingdom, and the United States. MANKABADY, THE LAW OF COLLISIONS AT SEA 557-559 (1987)(hereinafter cited as MANKABADY, COLLISIONS).

147. *Id.* at 71.

Regulations.[148]

Other widely-accepted regulations which indicate the international community's concern with safety at sea include: The International Code of Signals;[149] The International Convention on Load Lines;[150] The Tonnage Measurement of Ships Convention;[151] The International Convention for Safe Containers;[152] The International Convention on Maritime Search and Rescue;[153] and The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers.[154]

The safety regulations detailed above may be enforced by port states. Fourteen Western European states[155] have signed a "Memorandum on Port Control" which attempts to prevent the operation of sub-standard vessels. To this end, each state will require that foreign merchant ships visiting their ports comply with the standards laid down in a number of international instruments, including: The International Convention on Load Lines, The International Convention for Safety of Life at Sea, The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, and The Convention on The International Regulation for Preventing Collisions at Sea.[156]

In addition to proposing general safety measures, international conventions propose detailed measures to prevent, reduce and control pollution of the marine environment. Article 25 of the 1958 Convention on the High Seas requires states to cooperate with competent international organizations in taking measures for the prevention of pollution of the seas

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148. MSC/Circ. 320, of April 5, 1982, *cited in* MANKABADY, COLLISIONS, *supra* note 146, at 71, n.2.

149. MANKABADY, COLLISIONS, *supra* note 146, at 7. The first International Code of Signals was drafted by the British Board of Trade in 1855. This code was revised several times. A significantly different version was published by the International Radiotelegraph Conference in 1930. After the establishment of the IMO, the Code was revised once more. The IMO's Code, completed in 1964, embodied the principle that each signal had a complete meaning and therefore it left out the vocabulary method used in the previous editions. This Code was amended again in 1972, 1974, 1980, and 1984. *Id.*

150. London, April 5, 1966, 640 U.N.T.S 133; 18 U.S.T. 1857; T.I.A.S. 6331; SINGH, CONVENTIONS, *supra* note 121, at 982 (Vol. 2) (1983); QUENEUDEC, *supra* note 146, at 381.

151. London, June 23, 1969, *entered into force*, July 18, 1982, U.N. Registration No. A-21264; SINGH, CONVENTIONS, *supra* note 121, at 1848 (Vol. 2); QUENEUDEC, *supra* note 151, at 433.

152. Geneva, December 2, 1972, entry into force, September 6, 1977, U.N. docs. E/CONF.59/44 and E/CONF.59/46; 1064 U.N.T.S. 3; 29 U.S.T. 3709; T.I.A.S. 9037.

153. Hamburg, April 27, 1979, *entered into force*, June 22, 1985, *reprinted in* SINGH, CONVENTIONS, *supra* note 121, at 1671 (Vol. 2).

154. London, July 7, 1978, entry into force, April 28, 1984, U.N. Regist. No. 20690, IMO Publication Sales No. 78.15.E, at 5.

155. The fourteen states are: Belgium, Denmark, Finland, France, Federal Republic of Germany, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom and Northern Ireland. The memorandum provides for wider participation from non-EEC members with the consent of Party States. MANKABADY, IMO VOL. 2, *supra* note 67, at 38, n.3.

156. *Id.* at 39.

resulting from any activities with "harmful agents."[157] The main international agreement of this type is the International Convention for the Prevention of Pollution from Ships.[158] Particular emphasis has been placed on preventing oil pollution.[159] Several widely-adopted international agreements attempt to prevent this type of contamination of the seas.[160] For example, in 1975 the IMO adopted the "Code for the Construction and Equipment of Ships Carrying Liquified Gas in Bulk" which provides safety standards for the construction and operation of ships transporting gas.[161]

International agreements also attempt to compensate the victims of oil pollution. Under the International Convention on Civil Liability for Oil Pollution Damages,[162] liability is placed on the owner of the ship transporting oil.[163] The shipowner's liability is limited according to the

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157. *See* art. 194 of the 1982 Convention, *supra* note 37.

158. London, November 2, 1973, *entered into force*, October 2, 1983, U.N. Doc. ST/LEG/SER.B/18, at 457-517; 1973 U.N. JURIDICAL Y.B. 81 (1973). This is modified by the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, London, February 17, 1978, *entered into force*, October 2, 1983, U.N. Registration No. 22484; *reprinted in* IMO STAT. OF MULTILATERAL CONVENTIONS 47 (1984).

159. A detailed discussion of these efforts are beyond the scope of this discussion. *See generally*: KINDT, MARINE POLLUTION AND THE LAW OF THE SEA (1986); GOLD, HANDBOOK ON MARINE POLLUTION (1985); ABECASSIS & JARASHOW, OIL POLLUTION FROM SHIPS, (2nd ed. 1985); HAKAPAA, MARINE POLLUTION IN INTERNATIONAL LAW: MATERIAL OBLIGATIONS AND JURISDICTION (1981); Juda, *IMCO and the Regulation of Oil Pollution from Ships*," 26 INT'L & COMP. L. Q. 558, 562-564 (1977); Anderson & Bissell, *International Cooperation for the Prevention of Marine Oil Pollution*, SEA GRANT TECHNICAL BULLETIN No. 33 (1975); Mendelson, *Ocean Pollution and the 1972 U.N. Conference on the Environment*, 3 J. MAR. L. & COM. 385 (1971); Neuman, *Oil on Troubled Waters: The International Control of Marine Pollution*, 2 J. MAR. L. & COM. 349 (1971).

160. *See* International Convention for the Prevention of Pollution of the Sea by Oil, London, May 12, 1954, *entered into force*, July 26, 1958, U.N. document E/2609, ST/LEG/SER.B/15, at 787-799, 327 U.N.T.S. 3, 12 U.S.T. 2989; T.I.A.S. 4900; International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels, November 19, 1969, *entered into force* May 6, 1975, 26 U.S.T. 765, T.I.A.S. 8068; Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other Than Oil, London, November 2, 1973, *entered into force*, March 30, 1983, U.N. Doc. ST/LEG/SER.B/18, at 457-517.

161. Countries which have implemented the Gas Code in national regulations include: the United States, Sweden, Japan, Norway, Netherlands, Mexico, Finland, and Belgium. The Soviet Union and the United Kingdom apply the code on a voluntary basis. MANKABADY, IMO VOL.1, *supra* note 85 at 78.

162. Brussels, November 29, 1969, entry into force, June 19, 1975, U.N. Regis. No. A-14097; U.N. Doc. ST/LEG/SER.B/166, at 447-454; Protocol to the International Convention on Civil Liability for Oil Pollution Damage, London, November 19, 1976, *entered into force*, April 8, 1981, U.N. Regis. No. A-14097, *reprinted in* SINGH, CONVENTIONS, *supra* note 121, at 2489 (Vol. 3).

163. Liability is placed upon the owner unless the damage (1) resulted from an act of war or a natural phenomenon; (2) was wholly caused by an act or omission committed with intent to cause damage to a third party; or (3) was wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational equipment. The text of the convention is reprinted in 64 A.J.I.L. 481 (1970). For an extensive discussion of the convention, see Healy, *The International Conven-*

tonnage of the ship. Victims who are unable to obtain adequate compensation under the Civil Liability Convention may receive relief under the International Convention on the Establishment of an International Fund for Oil Pollution Damage.[164]

2. Domestic Standards

States must do more than follow internationally accepted safety and anti-pollution standards to fulfill their obligation to neither impede nor endanger other states' use of international waters. In addition, they must attempt to abide by their own safety standards. Although domestic regulations are not in themselves part of the corpus of international law, they do have an important relationship to the international law of the sea. Domestic standards exert a significant influence on the development of both conventional and customary international law.[165] Conversely, international standards are reflected in domestic regulations because states frequently incorporate all or part of international conventions into their own legislation.

As noted above, Article 94 of the U.N. Conference on the Law of the Sea requires that states take measures " 'as necessary' to ensure safety at sea."[166] In their own regulations, states define for themselves what they believe is necessary to abide by this requirement. The state definition may be more or less stringent than international regulations. In any event, the regulations indicate the measures that a state believes are necessary in order to sail a safe ship.[167] A state which does not even attempt to comply with its own definition of safety, and acts in a manner which it has defined as unsafe or environmentally unsound, cannot be said to be fulfilling its obligation to sail safe ships.

Furthermore, domestic safety standards are important simply because international conventions do not cover every situation. When international conventions are not directly applicable, the only way to tell whether a state is attempting to sail safe and nonpolluting ships is to examine whether the state is in compliance with its own standards. Thus, both international and domestic standards must be considered when determining whether a flag state has fulfilled its safety obligations.

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tion on Civil Liability for Oil Pollution Damage, 1 J. MAR. L. & COM. 317 (1970).

164. Brussels, December 18, 1971, *entered into force*, October 16, 1978, U.N. Doc. ST/LEG/SER.B/18, at 387. The Convention also provides some relief to shipowners who comply with certain international safety and antipollution standards.

165. Francisco Orrego Vicuna, *The Law of the Sea Experience and the Corpus of International Law: Effects and Interrelation-ships*, in THE DEVELOPING ORDER OF THE OCEANS 11 (Krueger & Riesenfeld, eds. 1985)(stating that paramount example is that of the exclusive economic zone).

166. *See supra* note 138 and accompanying text.

167. *See* Transportation Institute Memorandum, *The Safety of U.S.-Flag Ships Compared to Flag of Convenience Ships*, *supra* note 66, at 9.

B. *Whether the United States Met Its Obligations*

The United States' actions in the reflagging of the Kuwaiti oil tankers indicates that it was influenced in its decision by its international obligation to sail safe ships. If the United States had believed that it had no obligations to the world community in the sailing of the Kuwaiti tankers, it would have merely reflagged the vessels and declared them ready to sail into the Persian Gulf. However, the United States did not stop with the nearly-mechanical reflagging process. Rather, at great expense it followed the mandate of Article 94 of the U.N. Conference of the Law of the Sea and sent U.S. Coast Guard inspectors to inspect all ships on-site.[168]

Arguably, these actions were undertaken in order to ensure that the ships complied with domestic regulations. However, as noted above, domestic regulations reflect and incorporate international norms pertaining to safety. In addition, a desire to comply with domestic regulations could not have been the sole motivation for the costly inspections because Coast Guard officials specifically were instructed to take steps to ensure that international conventions were observed. Moreover, they were directed to refuse to give waivers for violations of Safety of Life at Sea Convention, or the International Load Line Convention.[169] Indeed, from review of publicly released documents, it appears that all ships were brought into compliance with international safety standards.[170]

While the United States complied with international conventions, it allowed the ships to sail in violation of several domestic safety and antipollution regulations.[171] The extent to which these regulations were violated is not clear. It appears, however, that the ships fell below acceptable standards in several important areas including: automation, steering gear requirements, fire protection, navigation, and ventilation requirements.[172] Nevertheless, while national defense waivers were granted for some domestic safety violations,[173] the Coast Guard refused to grant waivers for "manifestly unsafe conditions."[174]

The only area in which the United States completely waived international and domestic safety obligations is manning. By waiving its own manning requirements, the United States failed to fulfill Article 94's requirement that a flag state take measures to ensure safety at sea with

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168. *See supra* note 21.

169. *See* Telex to Mr. Stafford, May 4, 1987, *supra* note 10; May 21 Coast Guard Letter, *supra* note 20; House Memorandum, *supra* note 9, at 5.

170. House Memorandum, *supra* note 9.

171. The regulations for Coast Guard certification of foreign flag vessels brought under the U.S. flag are set forth in U.S. Coast Guard Navigation and Inspection Circular 10-81 (October 5, 1981). Additional requirements apply to oil tankers traveling in U.S. waters. *See* Davis, *Ports and Waterways Safety Act of 1972: An expansion of the Federal Approach to Oil Pollution*, 6 J. MAR. L. & COM. 249 (1975).

172. House Memorandum, *supra* note 9.

173. *See supra* notes 12-16 and accompanying text.

174. *See supra* note 10.

respect to manning ships and training seamen.[175] It allowed the ships to sail without meeting the U.S. manning requirements which provide that on U.S.-flag vessels, upon leaving a U.S. port, at least 75 percent of the unlicensed crew and all of the officers must be American citizens.[176] Since the tankers were not departing from a U.S. port, the Coast Guard reasoned, they were not required to use an American crew other than a master.[177]

The loophole in the manning requirements has been closed by the passage of a law which requires that the manning requirements apply regardless of whether the ship calls upon domestic ports.[178] This means that the if U.S. citizens are available for employment, they may be placed on the Kuwaiti tankers. Still, language in the existing law[179] and contained within the new provisions permits the President to waive the citizenship requirements for either a national emergency or because of lack of qualified seamen.[180]

While the manning policy stems in part from economic and military concerns, it also addresses safety concerns. By monitoring the qualifications and training requirements of U.S. seamen, the Coast Guard ensures that crews comprised of U.S. citizens are capable of sailing ships safely and of managing emergency situations. For example, licensed masters, mates, engineers, pilots, operators and radio officers must satisfy specific statutory requirements.[181] These and other manning requirements enhance the safety of U.S.-flagged vessels and, in ordinary situations, should be followed.

However, the situation in the Persian Gulf is not ordinary; oil tankers are not usually accompanied by a military escort. Under the extraordinary circumstances presented in the Gulf, military concerns dictate manning policies, rather than safety concerns. Therefore, under the extraordinary circumstances, the United States' decision to waive its own manning requirements was within its discretion.[182]

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175. *See supra* note 138 and accompanying text.

176. 46 U.S.C. § 8103(b) (1987).

177. *Supra* notes 24-26 and accompanying text.

178. H.R. 2598 was adopted into law on January 11, 1988. Pub. L. No. 100-239.

179. 46 U.S.C. § 8103(h) (1987).

180. As of this writing, a waiver has not yet been requested but it is likely that it will be requested in the near future. U.S. maritime unions are attempting to counter this anticipated request by underscoring the availability of American seamen. The Seafarers Union, for example, has initiated a membership letterwriting campaign requesting employment aboard the U.S.-flagged Kuwaiti tankers. Memorandum to all area vice-presidents, port agents and filed representatives, from Frank Drozak, President, Seafarers International Union (January 20, 1988).

181. 46 U.S.C. § 7101 (1987); 46 C.F.R. §§ 5.01-1 *et seq.* (1987).

182. This does not mean that other countries should have he unrestricted ability to waive manning requirements. Under more stable conditions, when a ship is reflagged for economic reasons, a state still is obligated to take measures to ensure safety at sea with respect to manning ships and training seamen.

V. CONCLUSION

This discussion has attempted to emphasize the importance under international law of the decision to flag and sail a ship. The flag which a ship bears is not only a symbol of a link between a ship and a state, but also a symbol of a link between a state and the international community. The United States' decision to reflag eleven Kuwaiti oil tankers may be characterized simply as a political decision. This does not mean, however, that this action could have been properly undertaken without consideration for the world community. All flag states, including those whose fleets might be considered to be sailing under flags of convenience, must fulfill two categories of responsibilities to the world community.

First, states must grant nationality to ships according to internationally accepted criteria. Currently, registration is both necessary and sufficient in order to establish nationality under international law. The United States met this criterion by properly registering and documenting the Kuwaiti tankers. But responsibilities to the world community do not stop with the granting of nationality. States also have an affirmative obligation to attempt to sail ships. In consideration for the right of all states to sail on the high seas, states must sail only those ships which are believed safe. In sailing the Kuwaiti tankers, the United States was cognizant of this general obligation. At great expense, the United States ensured that the tankers met international safety standards and most domestic standards.

It is likely that maritime flags will continue to be used for both political and economic reasons. In the future, states should continue to be aware of the implications of their decisions to grant nationality to a ship and their general obligation to sail safe ships. Only if states attempt to fulfill their responsibilities to the world community can freedom of the high seas continue to exist.

Julie Mertus

BOOK REVIEWS

Water Resources Policy for Asia

*Reviewed by George W. Pring**

ALI, Mohammed, RADOSEVICH, George E., and KHAN, Akbar Ali (eds.), WATER RESOURCES POLICY FOR ASIA, A. A. Balkema Publishers, Accord, Mass. (1987); $62.50 ISBN 90 6191 684 4, 628 pp.

"All your better deeds shall be in water writ. . ."[1]

Deeds, truly progressive accomplishments, in international water resources development indeed frequently seem "in water writ," so great are the twin gaps between the problems to be solved and effective solutions and between the latter and implementation. This volume presents a fascinating look through the eyes of some forty distinguished U.S. and international water experts, at the undercurrents in and the gulfs between what it aptly terms "The 3 P's of water management: problems, policy, and practices."[2]

Water, as the sage put it, touches everything. Nowhere is that homily more apparent than in the international context. Here, water is a virtual metaphor, a window on a surprising range of the great international issues: the tangled development aspirations of the Third World, the appropriate role of the industrial nations in that development, the interrelationships of population, health, and famine, the constraints of global economics, the difficulties of cooperative management of transboundary resources, considerations of the human and environmental impacts of development (and nondevelopment), the efficacy of agriculture-based economies, of central-planned systems, of socialized vs. capitalist development strategies, and on.

This book focuses on South and East Asian countries [3] and is of obvi-

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1. F. BEAUMONT & J. FLETCHER, PHILASTER, act V, sc. 3.

2. WATER RESOURCES POLICY FOR ASIA 6 (M. Ali ed. 1987).

3. The book is the printed proceedings of the Regional Symposium on Water Resources Policy in Agro-Socio-Economic Development, held in Dhaka, Bangladesh, August 4-8, 1985. Sponsored by the U.S. Agency for International Development and the Government of Ban-

ous interest to specialists in those areas. Moreover, given the generic nature of the problem it surveys, any readers interested in water law, international law, comparative law, or Third World futures will find rewards here.

The book begins with the usual prefaces by its three editors, Mohammed Ali and Akbar Ali Khan, senior water officials for the Government of Bangladesh, and George E. Radosevich, a distinguished water law expert, government consultant, author, and professor at Colorado State University. In the book's introduction, Professor Radosevich gamely attempts the editor's hardest task: to give *post facto* cohesion to 35 separate conference papers. That he succeeds as well as he does arranging them into three macro chapters on each of the "3 P's", problems, policies, and practices - is a credit to his skill and enhances their effectiveness.

Part I ("Problems - Problem Setting") begins, as it should, with an overview article attempting to set forth the "Regional Considerations." Given the staggering diversity of the "region" from Pakistan east to Indonesia, from water surplus states (Bhutan, Malaysia) to arid (Maldives, Pakistan), from monarchy (Bhutan) to democratic (Philippines) to socialist (China) politico-economies - it is perhaps not surprising this overview lacks depth and presents nothing new. It is followed by 10 country reports [4] and four articles on conference-host Bangladesh, authors by government water officials from those nations. The 14 are uneven in quality and sophistication, ranging from a few superficial pages to quite impressive treatments of climatic, economic, social, and governmental conditions (Pakistan, Nepal, and the Bangladesh chapters being especially good).

Titled somewhat more ambitiously than it can produce, Part II ("Policies - Substantive alternatives in Water Policy and Law") focuses us on general water policy/law principles, first in national legal systems, then traditional. The "national" section consists of an overview article by Professor Radosevich on "National water goals, policies and laws," then three articles by U.S. experts on surface water, groundwater, and water quality, respectively, each paired with a Bangladesh author's view of that issue domestically

Professor Radosevich's article constructs a model of the "good" national water resource regime, seeing the fundamental need as "a dynamic implementation process," based on goal-setting, translated into strong policies, linked to sound strategies, carried out through effective implementation programs. His discussion of the model and the reasons countries fail to meet it (including, the uncharitable might add, the U.S.) is an illuminating look at the often-forgotten or ignored, basic concepts of

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gladesh, with support from the International School for Agricultural and Resource Development at Colorado State University, the conference drew some 150 attendees from 19 countries and international and domestic agencies.

4. Bhutan, China, India (no paper ultimately received!), Indonesia, Malaysia, Maldives, Nepal, Pakistan, Philippines, and Thailand.

water allocation systems.

The next six articles should also be required reading for any serious student of water law. Professor Sanford Clark (Melbourne), Albert Utton (New Mexico), and Ralph Johnson (Washington), present incisive analysis of national and transboundary water, groundwater, and water quality management, respectively. Each is followed by superbly detailed, and surprisingly critical, accounts of how that management scheme is (or is not) working domestically in Bangladesh. The editor's themes of policy-implementation discontinuity, need for transnational planning, and interconnectedness of socio-economic environmental constraints are well-illustrated here.

The subsection on "Transnational Legal Systems" is disappointing. Here, we find two rather elementary articles on the role of customary law and the work of the International Law Commission in developing "international water law." Neither has, we find. In lieu of what would really have added to our knowledge of transboundary water issues - case studies of Third World-relevant efforts - we are given a rerun of the (scarcely model) U.S.-Mexico experience on the Colorado river and an almost insultingly short and bureaucratic piece on the World Bank, neither telling us what the significance it really has for Asia.

Part III ("Practices - Planning and Implementation Processes") gets back to what this book does best: impressive generic-issue pieces followed by detailed country-specific experiences. Sociologist Evan Vlachos' (Colorado State) lead article introduces that for which the humanist in us has been waiting: the social considerations in water development. While the environmentalist would strongly disagree with his anthropomorphic overstatement -

> the natural environment has meaning and utility only in the context of a social setting in which humans (and their culture) interact with nature [5]

- his hyperbole reminds us that we are, after all, engaged in a human enterprise for a human benefit. Professor Vlachos' effort to "reconstruct existing rules concerning water management"[6] is much more than the usual call for "improved institutional arrangements." But, as carefully constructed and persuasive as his ideal system is, it still leaves the reader wondering *how* true human values and societal/cultural concerns can be ascertained, *how* human needs can be balanced with environmental values in the sensitive context of the developing countries, and, ultimately, *how* any ideal system can move off the printed page and into political reality.

The country-specific articles following, regretfully, do not address these concrete human and environmental challenges. They do, however,

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5. *Supra* note 2, at 433.
6. *Id.* at 455.

give us detailed insights on implementation in Bangladesh, the Philippines, and the Mekong, Indus, and Gangetic Basins. Editor Akbar Ali Khan's discussion of economic considerations in Bangladesh water policy is particularly critical and detailed. The article on technical considerations by the distinguished agricultural engineer, Professor Gaylord Skogerboe, is a short send up not equal to his best work.

This book belongs in every serious international or natural resources library. It is not without its disappointments, as is any grand undertaking. The typewriter script is visually unpleasant, the frequent typos annoying, the quality of the articles uneven, the subjects incomplete (as at any conference), and the editors could have yielded sterner blue pencils. Nor is the book charting completely unexplored waters; a number of good treatments of international water development exist.[7]

But this volume has earned its place among them. We still have no answers to the perplexing problems of the proper role of environmental considerations in developing countries, of the extent to which water development is the "tail or the dog" of economic betterment, of the means for integrating surface and groundwater management and managing transboundary water quality/quantity collectively and responsibly. Perhaps that is the agenda for another conference.

In the meantime, our knowledge, our sensitivity, and our vision are enhanced by this admirable collection on Asian water development. As in a deep reach of a great river, we see captured in it a reflection of ourselves.

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7. To mention but a few: WATER NEEDS FOR THE FUTURE: POLITICAL, ECONOMIC, LEGAL, AND TECHNOLOGICAL ISSUES IN A NATIONAL AND INTERNATIONAL FRAMEWORK (V. Nanda ed. 1977); WATERSHED RESOURCES MANAGEMENT: AN INTEGRATED FRAMEWORK WITH STUDIES FROM ASIA AND THE PACIFIC (K. Easter ed. 1986); WATER MANAGEMENT AND ENVIRONMENTAL PROTECTION IN ASIA AND THE PACIFIC (I. Kato ed. 1983); *Economic and Social Commission for Asia and the Pacific, Proceedings of the Tenth Session of the Committee on Natural Resources* (1985); D. Camponera, *Patterns of Cooperation in International Water Law: Principles and Institutions*, 25 NAT. RESOURCES J. 563 (1985).

Escape From Berlin

*Reviewed by Theodore A. Borrillo**

KEMP, Anthony, ESCAPE FROM BERLIN, Boxtree Limited, London, England. (1987); Price 9.95 British Pounds, ISBN 1-85283-202-9, 173 pp.

This past summer I visited the Berlin wall and experienced the stark reality of its presence.

The total circumference of the wall that encircles West Berlin is 167.5 kilometers, and consists mostly of reinforced concrete, while at distant locations there is a mesh fence. There is a death strip between the outer and inner walls in which there are 295 watchtowers manned by soldiers of the DDR, anti-tank obstacles and anti-vehicle ditches to prevent attempts to crash through the wall, bunkers, floodlights, trip wires to release flares, dog runs and patrol roads.

The wall even cuts through the beautiful Havel river near the Glieniker Bridge to Potsdam, where one can view the omnipotent presence of the Soviet Union, with its flag flying over the military encampment on the other side of the bridge.

One may imagine that West Berliners are walled in, but that is not really the case as they may leave any time. It is their compatriots on the other side who are imprisoned and whose escape to the West has meant death. Hundreds more have been wounded and literally thousands have been caught and imprisoned.

Anthony Kemp's book deals with the history of escapes carried out by East Germans either over the border into West Berlin or into other countries. It is the story of courage and bravery and of the grim reality that "peace" and "freedom" for many are empty promises. While the wall abounds with the graffiti one customarily sees on New York subway trains, it is also sprinkled with words that echo the tragic history of Berlin. Along the wall are crosses erected for those who died in search of freedom.

Anthony Kemp has a journalistic free-flowing style of writing, enticing and easy to follow. Kemp acknowledges the cooperation of many individuals and organizations "for opening my eyes to the realities," including information from sources he does not feel free to identify. Many of the

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source materials obtained for the book came from interviews of those who succeeded to freedom and from materials and instruments and objects actually used to escape that are displayed at the museum at Checkpoint Charlie. Kemp did not have the cooperation, however, of various officials of the German Democratic Republic he invited to participate in his information gathering, presumably because "their hands were tied from above." In that sense, Kemp explains, the book may appear to be somewhat one-sided in its viewpoints.

On August 12, 1961, the Berlin wall was erected practically overnight notwithstanding earlier representations by Walter Ulbricht, the Party Secretary of the DDR,[1] that "nobody has any intention of building a wall."[2] While Berlin slept, families were divided, loving couples were separated and an entire community was disrupted. Prior to the wall, in excess of 50,000 East Berliners crossed into the West for work. Now, along the wired-off frontier, the small businesses that had lived off trade with East Berlin waited for customers who never came. Many pondered the impact of the world and the response of West Berlin and the free world, most of all, America.

In Theodore Sorenson's book on *Kennedy*, his chapter on "The Berlin Crisis" makes clear that Kennedy was willing to risk nuclear war to maintain three basic American objectives: "(1) the freedom of the people of West Berlin to choose their own system; (2) the presence of Western troops as long as the people required and desired them; and (3) unimpeded access from the West to the city across the East German *Autobahn*, air lanes and canals."[3] Khrushchev's efforts to exclude allied powers from West Berlin were not successful, but the wall remained as a fact of life.

While many were disappointed that the wall was not destroyed by the West, its presence rapidly unified the trust between America and other members of the free world, particularly West Germany. While the wall has succeeded in confining East Berliners, its presence to thousands

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1. Deutsche Demokratische Republik (German Democratic Republic). One of the old jokes in West Germany is that the DDR (East Germany) is neither German nor Democratic nor a Republic, which to a large extent is true. KEMP, ESCAPE FROM BERLIN 2 (1987).

Walter Ulbricht had been a long time member of the German Communist Party. "Ulbricht's long years in office - he dominated the affairs of East Germany from 1949 to 1971, longer than any German statesman since Bismarck - provided the DDR with the kind of political continuity that Adenauer's shorter tenure gave the Federal Republic, without, however, the quick prosperity or the internal stability that were notable in Western Germany." CRAIG, THE GERMANS 50-51 (1982).

2. "Between 1949 and early 1961, the exodus (from East to West) averaged 230,000 a year. Seventy-four percent of these refugees were under forty-five, and fifty percent under twenty-five, and they included many specialists whose skills were badly needed in the DDR and some whose loss could hardly be hidden, as when the entire law faculty of the University of Leipzig defected within a year. In August 1961, despite increased vigilance on the part of the police, the number of escapees reached 2000 a day." CRAIG, *supra* note 1, at 52.

3. SORENSON, KENNEDY 584 (1965).

of visitors each month to Berlin is the most persuasive reminder that we in America and other parts of the free world truly live in freedom. Glib tour guides in East Berlin would have one believe there are dancing girls in the streets and no unemployment in East Berlin, but they never mention the wall in their "lip service" (rather, they euphemistically refer to "the border").

The present wall is referred to by many as the Fourth Generation Wall. With each ingenious escape described by the author, the wall was improved to overcome the deficiency. The success in strengthening the wall has led to less and less successful escapes.

In many instances, the border of East Berlin was adjacent to houses where one could leap into West Berlin. Kemp describes an unforgettable scene of a 77-year-old lady hanging out of a window held from above by a member of the Volkspolizei, while below, young Westerners were pulling at her legs. Finally, she dropped into safety and was whisked away to the hospital. Now, those houses and churches that lined the border have been destroyed, removed, and replaced by a death strip of vacant land except for soldiers, dogs and flares.

The courage of others led to their building tunnels for escape, or swimming at great risk across rivers. Rivers are now lined with mines and metal beds with sharp prongs that would severely wound or kill anyone who challenges them by a dive into the water.

Kemp's book contains many photographs showing the devices used to escape, such as vehicles and properties into which individuals were stuffed and brought across the border undetected. Now, mirrors are extended into all portions of vehicles and properties to inspect any suspected areas. Others invented a form of airplane to fly into West Berlin, and the success of which had to be achieved without the benefit of prior field tests. Others created a clothesline that could be propelled over the wall and a chute that quickly hoisted a family across the wall.

In another instance, a woman tailored a Soviet military uniform for an East Berliner to wear through the border into West Berlin with a mere salute.

A master escape planner from West Berlin is Wolf Quasner. Escapes planned and engineered by Wolf Quasner are as mindful and interesting as those in a Frederick Forsyth novel. Quasner's list of accomplishments include forgeries, disguises and doubles. One of his early coups was carried out at the time of the Popes's first visit to Poland in 1979. When the Pope's entourage left, it included three extra priests and two nuns - all East Germans and all in appropriate clerical garb. Kemp states that "forgery" with flare and imagination is Quasner's specialty. In this regard, Kemp writes as follows:

> [Quasner] set up a complete organization to copy and reproduce genuine passports, and to manufacture the necessary stamps, visas and other papers. As an example of his cheek, he even concocted a passport from a country that did not exist except in his imagination. It is

> perfect, complete inside with a signed declaration from the "President of the Peoples' Revolutionary Council" and an impressive gold embossed coat of arms on the front.[4]

Kemp devotes a chapter of his book to Wolfgang Fuchs, a living legend of West Berlin. A conservative estimate of the number of refugees he helped escape to freedom would put the total number over 500. He was nicknamed "Tunnel Fuchs."

In 1961, Wolfgang Fuchs was a young political idealist who, like many Germans, was anti-Communist. Many of his friends from the East attended universities in the West. One day, there were empty seats in the lecture halls, and messages for help passed through the wall. Fuchs became the focus of student groups.

Fuchs was initially interested in the sewer system which ran under the wall at several places. Unfortunately, about the time Fuchs was ready to utilize the system for escape purposes, the East Germans fitted solid metal grilles across the tunnels and keyed them to sensitive alarms.

Fuchs next considered digging tunnels under the wall to freedom. Through friends, Fuchs gained access to cellars of homes in the West close to the wall. Fuchs then dug tunnels to cellars in homes in the Western Zone. During 1963 and 1964, Wolfgang Fuchs built seven tunnels under the wall, with each new tunnel an improvement over the last. The early tunnels were twenty to thirty meters in length, and by the end of the period the length had increased to 130 meters, with the tunnels benefitting from electric lighting, artificial ventilation and timber for shoring the walls.

The last tunnel was known as "Tunnel 57", because on the nights of October 3-4, 1964, fifty-seven people were brought through to freedom. On October 5, 1964, the tunnel was discovered and it effectively ended Fuch's tunnel building activities. East Germans began demolishing the rows of houses adjacent to the border to create a wide death strip and prohibited zone. Patrols by armed personnel were increased along the wall and, with this, tunnel building became a difficult and unsafe route to freedom.

Today, Wolfgang Fuchs is the proprietor of two drug stores in a shopping area of Berlin. Fuchs expressed hope to Kemp that one day "the Wall would be demolished by a gradual thaw in East-West rigidity and drew a parallel between the Berlin problem and the situation in Alsace-Lorraine today. That bitterly fought over territory, for centuries the bone of contention between European powers is now at peace. Its peoples can speak either French or German and move easily across the borders."[5]

As security tightened along the border, the early idealists who sought freedom with the same courage as wartime resistance fighters, became

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4. KEMP, *supra* note 1, at 108.
5. *Id.* at 82.

less and less. Kemp describes the "escape industry" created by professionals who trafficked in human beings. Organized criminal elements exploited the desperate human need to be free. Often, the goods were not delivered. For many, bungled attempts at freedom led to years of confinement in East German prisons for "attempting to flee the republic."

The future of West Berlin and the free world is unknown. The significance of Berlin, however, to the free world was poignantly described by President Kennedy outside the platform of the City Hall of Berlin on June 26, 1963, when he delivered one of his most inspiring talks.

> Two thousand years ago the proudest boast was "Civis Romanus sum." Today, in the world of freedom, the proudest boast is "Ich bin ein Berliner."
>
> There are many people in the world who do not understand, or say they don't, what is the greatest issue between the free world and the Communist world. Let them come to Berlin. There are some who say that Communism is the wave of the future. Let them come to Berlin. And there are even a few who say that it is true that Communism is an evil system, but it permits us to make economic progress. "Lasst sie nach Berlin kommen."
>
> Freedom has many difficulties and democracy is not perfect, but we have never had to put up a wall to keep our people in. . . .
>
> We . . . look forward to that day when this city will be joined as one - and this country, and this great continent of Europe - in peaceful and hopeful globe. When that day finally comes, as it will, the people of West Berlin can take sober satisfaction in the fact that they were in the front line for almost two decades.
>
> All free men, wherever they may live, are citizens of Berlin, and, therefore, as a free man, I take pride in the words "Ich bin ein Berliner."

Those words of President Kennedy take on an even deeper meaning as the shadow of time falls on the 751st anniversary of Berlin. When one stands at the foot of the wall, fortified now more than ever before, looking across that no-man's land, the Brandenburg Gate stands alone and ignored as a monumental reminder of the Berlin of yesterdays.

BOOK NOTES

LAWYERS AND THE NUCLEAR DEBATE. EDITED BY MAXWELL COHEN, O.C., AND MARGARET E. GOUDIN. University of Ottawa Press, Ontario, Canada (1988); $35.00; ISBN 0-7766-0209-8; xv, 419 pp.

This book is a presentation of the events that took place at the Canadian Conference on Nuclear Weapons and the Law. It reflects views and opinions of the international legal profession regarding the Nuclear Debate. Issues such as the existence of a legal basis for nuclear deterrence have been discussed in detail. Moreover, the role of space as the future battleground has been mentioned.

This volume, reflecting the perspective of lawyers in almost every legal system, presents a clear statement of the law's current stance on the nuclear question.

MARSH, D. AND READ, M., PRIVATE MEMBERS' BILLS; Cambridge University Press, Cambridge, England (1988); $42.50; ISBN 0-521-33051-3; vii, 208 pp.

Presentation of the first major survey of what in fact has made up the single largest set of legislation introduced in the Parliament. Most of these bills although unsuccessful, have entered the political realm in the context of private members' legislation. Also discussed is the curious and interesting relationship between the executive and legislature.

The second part of this survey is focused on timely and important issues such as abortion, smoking, pornography and seat belts. Suggestions for improving the present state of affairs is made.

WALKER, C., THE PREVENTION OF TERRORISM IN BRITISH LAW; Manchester University Press, Manchester, England (1986); ISBN 0-7190-1782-3; xi, 272 pp.

The book's focus is the Prevention of Terrorism Act. It's main theme revolves around the controversy regarding the Act. It considers both the provisions and the implementation methods of the Act, compares them to relevant laws and regulations from both Irish jurisdictions and concludes that the Act is ineffective.
The book covers the following areas: constitutional law, civil liberties, political science and military studies.

AMIN, S. H. DR., LAW AND JUSTICE IN CONTEMPORARY YEMEN; Royston Limited, Glasgow, United Kingdom (1987); 18.75 pounds; ISBN 0-946706-36-0; vi, 159 pp.

This volume focuses on the legal developments in two of the least known developing countries of the world. For the first time, a variety of issues with regard to legal, international, political commercial and historical interest in both North and South Yemen have been discussed. Legal reforms, social changes, and economic development are well documented in this book. The author gives an expert account of the administrative and constitutional systems of both North and South Yemen. Finally, there is an extensive comparison between the adverse policies adhered to in Communist South Yemen with those in Conservative North Yemen.

INTERNATIONAL NAVIGATION: ROCKS AND SHOALS AHEAD? EDITED BY JON M. VAN DYKE, LEWIS M. ALEXANDER AND JOSEPH R. MORGAN; The Law of the Sea Institute, Honolulu, Hawaii (1988); $35.00; ISBN 0-911189-17-3; ix, 435 pp.

This volume is a complete presentation of the discussions which took place in Honolulu in January of 1986. International Navigation was the topic of the conference in which a number of distinguished scholars and jurists participated.